

# The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On- Going Abuses of Human Rights

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## INTRODUCTION

We tend to think of *Chae Chan Ping v. United States*<sup>1</sup> and the other Chinese exclusion cases of the late 1800s as a remnant of the racist past of Asian exclusion and segregation in America. However, these cases have had a tenacious grip on American law, and are very much alive and well. In the Chinese exclusion cases the Supreme Court first articulated the “plenary power” doctrine in the context of immigration law. Shortly thereafter, the plenary power doctrine also became a cornerstone of federal law governing both American Indian nations and external colonies such as Puerto Rico and Guam.<sup>2</sup> Today, it is the plenary power doctrine articulated in these cases which allows the Justice Department to engage in the highly troubling selective imprisonment and deportation of Muslim, Arab, and Middle Eastern immigrants.

The Chinese exclusion cases provide a valuable lens through which we can look at the significant role that the plenary power doctrine exercises in contemporary American jurisprudence. As such, they illustrate that the treatment of Asian Americans in the law cannot be dismissed as aberrational. More than a century of plenary power cases further demonstrate that the fate of Asian American communities is inextricably linked to that of all those deemed “Other” in America today, whether by virtue of race, ethnicity, national origin, religion, or citizenship status.

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1. 130 U.S. 581 (1889). While this is generally known as the *Chinese Exclusion Case*, I also include the related cases cited below using the plural.

2. See *infra* text accompanying notes 90-110.

“Plenary” simply means full or complete. The Supreme Court has used this doctrine to say that in certain substantive areas such as immigration law the courts will not intervene because Congress and the executive – the “political branches” of government – have complete power. This doctrine is rarely discussed outside these areas of the law, but it is critical to an accurate understanding of how the law is applied to many groups of people subject to U.S. jurisdiction. A working knowledge of the history and the current applications of the plenary power doctrine is, therefore, essential to lawyers and legal scholars concerned with unjust or unconstitutional aspects of American law and policy affecting these groups.<sup>3</sup> This essay will provide an overview of the importance of the Chinese exclusion cases in the development of this doctrine, briefly illustrating why we cannot afford to ignore their legacy.

### I. CHINESE EXCLUSION AND THE INVOCATION OF PLENARY POWER

The plenary power doctrine was first articulated in the immigration context in the Chinese exclusion cases. Chinese immigration had been encouraged as a source of cheap labor in the United States from the 1840s through the 1860s.<sup>4</sup> Anxious to open up trade with China, the United States entered into the 1868 Burlingame Treaty, a provision of which touted the “inherent and inalienable right of man to change his home and allegiance, and . . . the mutual advantage of free migration.”<sup>5</sup> However, with the completion of the transcontinental railroad in 1869 and the economic depression of 1873, pressure mounted on Congress to restrict immigration.<sup>6</sup> In 1882 legislation was passed suspending the immigration of new Chinese laborers for ten years.<sup>7</sup>

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3. For a more detailed description of the plenary power doctrine in this context, see generally Natsu Taylor Saito, *Asserting Plenary Power Over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 *YALE L. & POL’Y REV.* 427 (2002); T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE AND AMERICAN CITIZENSHIP* (2002); 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 (2002).

4. See RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 21-31 (1989); SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 3-17 (1991).

5. Burlingame Treaty, July 28, 1868, U.S.-P.R.C., 16 Stat. 739, T.S. No. 48. See also ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 180-181 (4th ed. 1998).

6. See Select Commission on Immigration and Refugee Policy [SCIRP], *U.S. Immigration Policy and the National Interest*, Staff Report (1981), reproduced in ALEINIKOFF ET AL., *supra* note 5, at 158. See generally ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943 (Sucheng Chan ed., 1991).

7. Act of May 6, 1882, ch. 126, 22 Stat. 58. In 1880 the United States had convinced China to amend the Burlingame Treaty by allowing the United States to “regulate, limit or suspend” the immigration of additional Chinese laborers while promising that those who were already in the United States could “go and come of their own free will.” See Hiroshi Motomura, *Immigration Law After a*

In 1884 Congress required all Chinese residents who wanted to leave the United States temporarily to obtain certificates of re-entry.<sup>8</sup> Chae Chan Ping, who had lived in the United States for 12 years, obtained one of these certificates and went to China to visit his family. In 1888, a few days before his return, a new law went into effect precluding the entry of *all* Chinese workers, regardless of whether they held certificates.<sup>9</sup> Chae Chan Ping challenged the 1888 law as a violation of the Burlingame Treaty and a violation of his Fifth Amendment due process rights.<sup>10</sup>

Writing for the Court in *Chae Chan Ping v. United States*, commonly known as the *Chinese Exclusion Case*, Justice Field acknowledged that the statute did conflict with the treaty, but said the 1888 law would nonetheless be enforced under the “last in time rule,” according to which courts will enforce a later-enacted federal statute that conflicts with a treaty even if the result is a violation of international law.<sup>11</sup> This is but one of several similar doctrines that make it difficult to get international law enforced in U.S. courts.<sup>12</sup> Others include the courts’ refusal to enforce treaties or treaty provisions deemed “non-self-executing,”<sup>13</sup> and the courts’ deference to congress and/or the executive branch on “political questions.”<sup>14</sup>

On the constitutional question, Justice Field held that Congress has the power to regulate immigration, a subject not explicitly referenced in the Constitution. He added that the courts would not intervene because that power emanated from the government’s prerogatives over national security, territorial sovereignty, and self-preservation. Reflecting the still prevalent conflation of race, immigration, and matters of national security, Justice Field said if Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.”<sup>15</sup>

In 1892 the Court upheld an immigration officer’s exclusion of a Japanese woman, Nishimura Ekiu, without a hearing, on the ground that

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*Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550 (1990).

8. ALEINIKOFF ET AL., *supra* note 5, at 181-82.

9. *Id.* at 182.

10. *See Chae Chan Ping v. United States*, 130 U.S. 581, 589-90 (1889).

11. *Id.* at 600.

12. *See Whitney v. Robertson*, 124 U.S. 190 (1888) (enforcing a later-enacted law exempting Hawaiian sugar from duty despite its conflict with an earlier treaty with the Dominican Republic). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 115, “Inconsistency Between International Law or Agreements and Domestic Law: Law of the United States” (1987).

13. *See Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (declaring that treaties in the nature of a contract to perform a particular act require legislation before the courts will enforce them).

14. *See Baker v. Carr*, 369 U.S. 186, 211-213 (1962) (stating that judicial deference to the “political branches” of government is appropriate with respect to certain matters of foreign policy).

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

she was likely to become a public charge.<sup>16</sup> Justice Gray wrote, "It is an accepted maxim 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."<sup>17</sup> The Court then extended the plenary power from substantive to procedural immigration matters, noting that "[a]s to [foreigners], the decisions of executive or administrative officers, acting with powers expressly conferred by Congress *are* due process of law."<sup>18</sup>

Congress extended the ban on Chinese laborers in 1892 and provided that a worker who was already here could stay only if he obtained a certificate of residency. This certificate, among other things, had to be based on the testimony of a "credible white witness."<sup>19</sup> In 1893, in *Fong Yue Ting v. United States*,<sup>20</sup> the Supreme Court rejected the claims of three Chinese workers who were acknowledged to be long-term residents but had no white witnesses to attest to that fact. Justice Gray, writing for the Court, extended Congress' plenary power from the exclusion of those first arriving to the deportation of permanent residents.<sup>21</sup> He rejected equal protection claims based on the racial restrictions of the certificate,<sup>22</sup> and refused to characterize deportation as punishment that would trigger heightened constitutional scrutiny.<sup>23</sup> Shortly thereafter, in *Wong Wing v. United States*,<sup>24</sup> the Court held that a person who violated the immigration laws could not be sentenced to imprisonment at hard labor without the constitutional protections afforded other criminal defendants, but reiterated that deportation *per se* was not punishment. This was a particularly significant finding, for it has been used to say that while persons who violate immigration law cannot be *sentenced* to prison without constitutional due process, they can be detained – *i.e.*, imprisoned – pending deportation.<sup>25</sup>

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16. See *Nishimura Ekiu v. United States*, 142 U.S. 651, 662 (1892).

17. *Id.* at 659.

18. *Id.* at 660 (emphasis added).

19. ALEINIKOFF ET AL., *supra* note 5, at 199.

20. 149 U.S. 698 (1893).

21. *Id.* at 713-14, 723-24.

22. *Id.* at 729-30 ("The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of congress, which congress may, at its discretion, modify or repeal."). Three dissenting justices argued that some constitutional protections should apply, but no one questioned Congress' right to exclude on the basis of race or nationality. *Id.* at 732-63.

23. *Id.* at 733-34.

24. 163 U.S. 228 (1896).

25. See *infra* text accompanying note 31.

## II. THE PLENARY POWER DOCTRINE IN CONTEMPORARY IMMIGRATION LAW

The plenary power doctrine was reinforced in cold-war era immigration cases, the most famous of which are *United States ex rel. Knauff v. Shaughnessy*<sup>26</sup> and *Shaughnessy v. United States ex rel. Mezei*.<sup>27</sup> Ellen Knauff was the German wife of a U.S. citizen, a woman who had performed "excellent" work as a civilian employee of the U.S. War Department in Germany. Nonetheless, the Court held that she could be excluded without a hearing on the mere assertion of the Attorney General that her admission would be "prejudicial to the interests of the United States."<sup>28</sup> In *Mezei*, the Court followed *Knauff*, holding that a permanent resident who had lived, as Justice Jackson put it in his dissent, a "life of unrelieved insignificance" in Buffalo for 25 years<sup>29</sup> and who had gone "behind the Iron curtain"<sup>30</sup> to visit his dying mother could be excluded, again without a hearing and on the basis of confidential information. Furthermore, the Court held that Ignatz Mezei could be held indefinitely on Ellis Island if he had nowhere else to go.<sup>31</sup> Extending the rationale of *Wong Wing*, the Court held that because deportation is not punishment, indefinite incarceration pending deportation is not punishment either.

These cases have, in turn, been used to allow the indefinite detention of Mariel Cubans who were deemed excludable by the Immigration and Naturalization Service ("INS") but not accepted back by Cuba;<sup>32</sup> the imprisonment of Haitian refugees pending adjudication of their claims for political asylum;<sup>33</sup> the interception and forced return of fleeing Haitians found on the high seas;<sup>34</sup> and the refusal to allow boats carrying

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26. 338 U.S. 537 (1950).

27. 345 U.S. 206 (1953).

28. *Knauff*, 338 U.S. at 541.

29. *Mezei*, 345 U.S. at 219.

30. *Id.* at 214.

31. *Id.* at 208.

32. See *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986), *cert. denied sub nom Ferrer-Mazorra v. Meese*, 479 U.S. 889 (1986). Even though Cuban prisoners have been held in maximum security federal prisons, subjected to strip searches and beatings, and moved arbitrarily from facility to facility, they have not been accorded Eighth Amendment rights because INS detention is deemed civil, not criminal, per *Fong Yue Ting* and its progeny. See Richard A. Boswell, Book Review, *Throwing Away the Key: Limits on the Plenary Power?*, 18 MICH. J. INT'L L. 689, 702 (1997). For an excellent summary of the plenary power doctrine in this context, see Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995).

33. See *Jean v. Nelson*, 472 U.S. 846 (1985).

34. See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (sustaining the interdiction program and holding that neither the Refugee Convention nor a provision of the Immigration Act which could have provided relief applied to actions on the high seas). See generally Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT'L L.J. 675 (1993); Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35

undocumented Chinese workers and asylum seekers to land in U.S. ports.<sup>35</sup>

In 1984 the 11th Circuit, relying on *Fong Yue Ting*, *Nishimura Ekiu*, *Mezei*, and other plenary power “classics,” held in *Jean v. Nelson* that noncitizens who have not been admitted “have no constitutional rights with regard to their applications, and must be content to accept whatever statutory rights and privileges they are granted by Congress.”<sup>36</sup> The following year the Supreme Court refused to grant cert in *Garcia-Mir v. Meese*,<sup>37</sup> which followed *Jean* and noted specifically that claims under international human rights law were inapplicable.

Such rights and privileges as had been granted by Congress were dramatically reduced by the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996,<sup>38</sup> as well as the 1996 Antiterrorism and Effective Death Penalty Act.<sup>39</sup> Together, these laws combined to restrict due process and judicial review in immigration cases. They made it easier to deport people based on their associational activities;<sup>40</sup> redefined many crimes – including some misdemeanors – as “aggravated felonies;” and retroactively rendered permanent residents deportable on the basis of prior convictions, pleas, or associational activities.<sup>41</sup> Again relying on the theory enunciated in *Wong Wing* that deportation is not punishment, *i.e.*, that it is a civil rather than criminal proceeding, the retroactive effect of the law has not been deemed a violation of the prohibition on *ex post facto* laws.<sup>42</sup>

HARV. INT’L L.J. 1 (1994).

35. See Department of Transportation, U.S. Coast Guard, *Statement of Anthony Tangeman to the Subcommittee on Migration and Claims Committee on the Judiciary, U.S. House of Representatives* (May 18, 1999) available at 1999 WL 16947941 (noting that since 1991 the Coast Guard had intercepted over 5,000 Chinese migrants). See also Teresa Puente, *Jailed Chinese Nationals Given a Taste of Freedom; Detainees Released During INS Reviews*, CHI. TRIB., Oct. 1, 1999, available at 1999 WL 2917645 (noting that the Chinese had been interdicted by the Coast Guard).

36. 727 F.2d 957, 968 (11th Cir. 1985). The Supreme Court ruled that the 11th Circuit should not have reached the constitutional question, and declined to revisit *Knauff* or *Mezei*. See *Jean v. Nelson*, 472 U.S. 854-55 (1985).

37. 788 F.2d 1446 (11th Cir. 1986).

38. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

39. Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

40. See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 117-126 (2002). See generally David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203 (1999); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833 (1997).

41. See ALEINIKOFF ET AL., *supra* note 5, at 738-39.

42. The right to exclude people on the basis of their political opinions was established in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). On the extension of this principle in recent legislation, see generally Victoria Cook Capitaine, *Life in Prison Without a Trial: The Indefinite Detention of Immigrants in the United States*, 79 TEX. L. REV. 796 (2001); Lucas Guttentag, *Slamming the Courthouse Door: Immigrants and the Right to Judicial Review*, 28 HUM. RTS. Q. 19 (2001); Lisa J. Laplante, *Expedited Removal at the U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L.

In dozens of cases since the late 1980s, the INS has relied on the plenary power doctrine to detain and deport Muslims and Arabs on the basis of secret evidence, *i.e.*, evidence it would not reveal to those it was trying to deport or to their lawyers.<sup>43</sup> Georgetown law professor David Cole represented thirteen persons the INS was attempting to deport in such a manner. He testified to a subcommittee of the House Judiciary Committee as follows:

[A]t one time the INS claimed that all 13 posed a direct threat to the security of the nation, and that the evidence to support that assertion could not be revealed – in many instances could not even be summarized – without jeopardizing national security. Yet in none of these cases did the INS's secret evidence even *allege*, much less prove, that the aliens had engaged in or supported any criminal, much less terrorist, activity.<sup>44</sup>

Thus, for example, Nasser Ahmed was held, mostly in solitary confinement, for over three and one-half years while the INS, relying on secret evidence, attempted to deport him “as a threat to the national security.”<sup>45</sup> Ahmed, the father of four U.S. citizen children, fought deportation because, as an immigration judge conceded, he would most likely be tortured if returned to Egypt and thus was eligible for political asylum.<sup>46</sup> For the first year, the government would not even provide Ahmed's lawyer with a summary of the evidence. Eventually it produced a one-line summary which simply asserted that it had information “concerning respondent's association with a known terrorist organization,” but would not identify the organization.<sup>47</sup> Eventually, when the INS revealed its previously classified information, much of which was unsubstantiated “double or triple hearsay,” a federal district judge concluded that he was not, in fact, a threat to the national security and ordered him released.<sup>48</sup>

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& SOC. CHANGE 213 (1999); Anne E. Pettit, Note, “*One Manner of Law*”: *The Supreme Court, Stare Decis* and the Immigration Law Plenary Power Doctrine, 24 FORDHAM URB. L.J. 165 (1996).

43. See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1, 14-24 (2001). See generally, Susan M. Akram, *Scheherazade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999).

44. Statement of Professor David Cole, Georgetown University Law Center, On the Use of Secret Evidence in Immigration Proceedings and H.R. 2121, Before the House Judiciary Committee, Subcommittee on Immigration and Claims, (Feb. 10, 2000) available at <http://www.house.gov/judiciary/cole0210.htm>.

45. *Id.*; COLE & DEMPSEY, *supra* note 40, at 129-30; Akram, *supra* note 43, at 76.

46. COLE & DEMPSEY, *supra* note 40, at 130.

47. *Id.* at 129-30.

48. *Id.* at 131. As these cases indicate, several federal courts refused to allow deportations on the basis of secret evidence. See, e.g., *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989), *remanded to* 795 F. Supp. 13 (D.D.C. 1992); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D. N.J. 1999). However, even this check on unrestrained executive power has been cut short by the Supreme Court's holding in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), that the 1996 IIRIRA eliminated judicial review in such cases.

In Ahmed's case, it turned out that the FBI and INS were attempting to make good on their threat to deport him for refusing to inform on Sheik Abdel Rahman, who was on trial for conspiracy in connection with the 1993 World Trade Center bombing.<sup>49</sup> A similar motivation was revealed in the case of Mazen al-Najjar, a long-time U.S. resident, father of three U.S. citizen children, and the son of U.S. citizen parents. Al-Najjar was also held for nearly four years on the basis of secret evidence until a federal judge ordered an "open evidence" hearing and found that he posed no threat to the national security. In this case, federal officials offered to release Al-Najjar if people who knew him would inform on others in the community.<sup>50</sup> Again, this indicates that the government did not actually consider him a security risk, but was using his incarceration to obtain information illegitimately. As discussed below, this appears to be a motive of the federal government in many of the post-September 11 detentions as well.<sup>51</sup>

The plenary power cases, reaching all the way back to *Chae Chan Ping*, are all still regarded as "good law" and have established a number of principles that apply directly to the post-September 11 detentions of Arab, Muslim, or Middle Eastern "aliens" in the United States today. According to these precedents, Congress and/or the executive have the power to decide who can come, how long they can stay, and when they must leave. In so doing, Congress can discriminate on the basis of race, national origin, or other characteristics which would trigger heightened judicial scrutiny in other contexts. Congress can change the rules and then apply new rules retroactively without violating the prohibition on *ex post facto* laws. Under these circumstances, the "due process" guaranteed by the Fifth Amendment is whatever Congress says it is. Because deportation is deemed not to be punishment, the constitutional protections guaranteed to all persons in criminal trials do not apply, allowing, among other things, the use of secret evidence and indefinite incarceration without a hearing. The plenary power cases establish that federal courts will allow these practices even if they put the United States in violation of international law.

### III. POST-SEPTEMBER 11 DETENTIONS AND DEPORTATIONS

In the weeks following the September 11 attacks on the World Trade Center and the Pentagon, Justice Department officials – perhaps believing this would give the American public a sense of enhanced "security" – periodically announced a running total of the hundreds of people it was detaining in connection with the attacks.<sup>52</sup> They did not, however, reveal

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49. COLE & DEMPSEY, *supra* note 40, at 129.

50. *Id.* at 132.

51. *See infra* text accompanying notes 63-64.

52. NANCY CHANG, SILENCING POLITICAL DISSENT 69 (2002).



who was in custody; what, if anything, they were charged with; or where they were being held.

The media soon began reporting stories of the families of the “disappeared.”<sup>53</sup> Wives and children came home to discover that their husbands or fathers had vanished. They made frantic inquiries to local and federal authorities which yielded no information. They received occasional phone calls from the men who reported that they were being moved from state to state, often kept in maximum security prisons and questioned without being told why they were being held.<sup>54</sup> Attorney General John Ashcroft assured us that the detainees had access to lawyers, but both detainees and their lawyers reported otherwise.<sup>55</sup>

On October 29, 2001, a coalition of civil liberties and human rights organizations filed a request under the Freedom of Information Act (“FOIA”) demanding basic information on those being held.<sup>56</sup> A few days later the Justice Department announced that it would no longer release even the numbers of those detained, which by then had reached 1,147.<sup>57</sup> In response to the suit, the Department of Justice reported that 460 persons remained in INS custody in January 2002, a number that had fallen to 104 by the end of May.<sup>58</sup> Most were said to be held on immigration charges, some on criminal charges, and a few as material witnesses.<sup>59</sup> Despite the thousands of arrests, by late summer only one person had been indicted on charges related to the September 11 attacks, and that was Zacarias

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53. The parallel drawn here and by other commentators is to the internationally condemned practice of certain Latin American governments of “disappearing” political dissidents, most of whom were later found to have been tortured and/or killed. *See, e.g., id.*

54. *Id.* at 77-81. As the daughter and granddaughter of Japanese American World War II internees, I found this frighteningly reminiscent of stories my father told of coming home from junior high school to find that his mother had disappeared and FBI agents were ransacking the house. On parallels between the Japanese American internment and the current treatment of Muslims and Arab Americans, see generally Saito, *supra* note 43.

55. CHANG, *supra* note 52, at 77-81. *See also* Amnesty International, United States of America: *Amnesty International's concerns regarding post September 11 detentions in the USA*, Mar. 13, 2002, AI-index: AMR 51/044/2002, available at [www.aisua.org/](http://www.aisua.org/).

56. *See* Press Release, “CNSS and Other Sue Justice Department to Release Information on Detainees,” Dec. 5, 2001, available at <http://cnss.gwu.edu/cnss/pr120501.htm>. A month later the FBI formally denied the request, while the INS and Justice Department acknowledged its receipt but did not respond. *Id.* On October 12, 2001, Attorney General Ashcroft issued a directive to all federal agency and department heads cautioning them against release of any information pursuant to FOIA requests, and assuring them that the Justice Department would provide full legal support to any denials. *See* “Memorandum for Heads of All Federal Departments and Agencies” dated October 12, 2001, from John Ashcroft, Attorney General, available at <http://www.usdoj.gov/04foia/o11012.htm>.

57. Amy Goldstein & Dan Eggen, *U.S. to Stop Issuing Detention Tallies*, WASH. POST, Nov. 9, 2001, at A16. *See also* CHANG, *supra* note 52, at 69.

58. *Ctr. for Nat'l Sec. Studies, et al. v. Dep't of Justice*, 217 F. Supp. 2d 58 (D. D.C. 2002). *See* “Feds Sued by Civil Rights Groups,” AP Press Release, Dec. 5, 2001, available at <http://www.solai.com/forum/articles/agearn-1.html>; *See also* Press Release, *supra* note 56.

59. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960 (2002). As Cole notes, “[w]ith the exception of Zaccarias Moussaoui and perhaps the material witnesses, all of the detainees are being held on ‘pretextual’ charges.” *Id.* at 962.

Moussaoui, who had been in custody since August 2001.<sup>60</sup>

Pursuant to a directive issued by Immigration Judge Michael Creppy on September 21, 2001, almost all of the immigration hearings have been closed to the press and the public.<sup>61</sup> As a result, the only information we have about the detainees comes through their families and lawyers. In one of the better known cases, a Muslim leader from Detroit, Rabih Haddad, was able to get letters out. He reported that he was held in solitary confinement for months under bright lights and constant surveillance, allowed outside of his cell for only one hour a day, during which time he was taken in shackles down the hall to a cage with a non-functioning exercise bicycle. Haddad was allowed no contact with other inmates and only one fifteen minute phone call to his family each month. During this ordeal he was never told why he was being detained.<sup>62</sup>

Recently, Hady Hassan Omar, who was held under similar conditions without charge for seventy-three days, sued the federal government.<sup>63</sup> Convinced that he could be held forever, Omar unsuccessfully attempted several hunger strikes and then decided to commit suicide. It was only at this point that the government released him, finally convinced that he had no useful information. The infliction of what amounts to psychological torture appears to be part of the government's strategy in these cases. According to one senior law enforcement official in Washington, D.C., "If your subject has a complete breakdown . . . he has lost the will to deceive, and you can be pretty certain that he's not lying."<sup>64</sup>

Because the Justice Department will not release the information, we do not know who else is being held, where they are, and what, if anything, they are being charged with. However, it does appear that all of those detained have been men who are Arab, Muslim or of Middle Eastern descent.<sup>65</sup> National origin, age, and gender have also been the criteria for several new Justice Department programs, including the targeting of 5,000 immigrants for "voluntary" interviews,<sup>66</sup> the expedited deportation of a

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60. *Id.* at 960.

61. Memorandum from Chief Immigration Judge Michael Creppy to All Immigration Judges re: Cases Requiring Special Procedures (Sept. 21, 2001), available at <http://news.findlaw.com/hdocs/docs/aclu/creppy092102memo.pdf>. See also *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (finding the order unconstitutional in the case of Rabih Haddad); William Glaberson, *Closed Immigration Hearings Criticized as Prejudicial*, N.Y. TIMES, Dec. 7, 2001, at B7.

62. Letter from Rabih Haddad to Mr. Thayer, a member of the Chicago Coalition Against War & Racism (Jan. 27, 2002) (on file with author). See also Reuters, *Group Reports Mistreatment of Detainees*, N.Y. TIMES, Mar. 15, 2002, at A11.

63. See Matthew Brzezinski, *Hady Hassan Omar's Detention*, N.Y. TIMES MAG., Oct. 27, 2002, at 50.

64. *Id.* at 55.

65. Cole, *supra* note 59, at 974-77.

66. Fox Butterfield, "A Police Force Rebuffs F.B.I. on Querying Mideast Men," N.Y. TIMES, Nov. 21, 2001, at B7. The police department in Portland, Oregon refused to cooperate in this program,

select group of people who have violated terms of their visas,<sup>67</sup> and cumbersome new INS entry/exit registration procedures.<sup>68</sup>

As noted above, in *Mezei* the Supreme Court extended the *Wong Wing* rationale that deportation is not punishment to allow the indefinite incarceration of someone who could not be deported because no other government would accept him.<sup>69</sup> The government now appears to be extending this prerogative to detain people indefinitely even after they have agreed to leave or could otherwise be deported. As of February 2002, the Justice Department had reportedly blocked the departure of eighty-seven such persons, apparently because they had not been “cleared” by the FBI.<sup>70</sup> According to David Cole, “The government was continuing to hold them simply because it had not yet satisfied itself that they were innocent, even though there was no longer any ostensible immigration purpose for their detention, they were charged with no crimes, and they had been afforded no probable cause hearings.”<sup>71</sup>

As many of these actions indicate, the immigration-related justifications for the post-September 11 surveillance, questioning, and detentions of noncitizens seems to be pretextual. Many have criticized these executive acts as unconstitutional,<sup>72</sup> and if the acts were being undertaken in the context of criminal rather than immigration cases, they would clearly violate a number of constitutional guarantees. These include the First Amendment’s protections of freedom of speech and association;<sup>73</sup> the Fourth Amendment’s prohibition of unlawful searches and seizures;<sup>74</sup> the Fifth Amendment rights to due process and equal protection;<sup>75</sup> the Sixth Amendment’s right to a fair trial, including the right to counsel;<sup>76</sup> and the Eighth Amendment’s prohibition of both excessive bail and cruel and unusual punishment.<sup>77</sup> All of these are rights which, outside of the

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noting that Oregon law “prohibited the local police from questioning immigrants when they were not suspected of any crime and the only issue under discussion was their foreign citizenship.” *Id.*

67. Using these criteria, a group of about 6,000 was targeted from among the more than 300,000 persons known to be out of status. Cole, *supra* note 59, at 975.

68. Department of Justice Press Release, “Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System,” Aug. 12, 2002, available at [www.usdoj.gov/opa/pr/2002/August/02\\_ag\\_466.htm](http://www.usdoj.gov/opa/pr/2002/August/02_ag_466.htm).

69. See *supra* text accompanying notes 29-31.

70. See Cole, *supra* note 59, at 964.

71. *Id.*

72. See generally, CHANG, *supra* note 52; Cole, *supra* note 59; Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, \_\_ GEO. IMMIGR. L. J. \_\_ (2002) (forthcoming).

73. U.S. CONST. amend. I.

74. U.S. CONST. amend. IV.

75. U.S. CONST. amend. V. The Fifth Amendment’s guarantee of due process has been interpreted to encompass equal protection as guaranteed by the Fourteenth Amendment. U.S. CONST. amend. XIV; see *Bolling v. Sharpe*, 347 U.S. 497 (1954).

76. U.S. CONST. amend. VI.

77. U.S. CONST. amend. VIII.

immigration context, apply to all persons, not just to citizens.<sup>78</sup>

It appears to be the long history of plenary power cases which gives the government the leeway to disregard these provisions. Since Justice Field's opinion in *Chae Chan Ping*, the Supreme Court has consistently maintained that the plenary powers of Congress and the executive are an outgrowth of the government's prerogatives with respect to national security and the protection of territorial sovereignty.<sup>79</sup> Federal courts have already used the plenary power doctrine to justify exclusions and deportations based on national origin,<sup>80</sup> to exclude or deport people based on their political beliefs or associations,<sup>81</sup> to deny even permanent residents a Fifth Amendment right to due process in deportation proceedings,<sup>82</sup> and to allow indefinite detention pending deportation.<sup>83</sup>

In light of this history, the plenary power doctrine will undoubtedly play a prominent role in the government's justification of these post-September 11 actions as legal challenges work their way up through the federal courts.<sup>84</sup> If this is the case, then those who believe such actions are contrary to the rule of law need to have a clear understanding of the plenary power doctrine, and must carefully consider how we can ensure that American jurisprudence protects fundamental human rights. The following sections outline some of the issues we must confront in that process.

#### IV. THE BROADER CONTEXT OF THE PLENARY POWER DOCTRINE

A common response to the injustices which result from the exercise of plenary power is to call for improved legislation. Thus, it might appear that the best solution to some of the problems outlined above would be to lobby

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78. See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 84-86 (2001); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 1-15 (1996). See also *Yick Wo v. Hopkins*, 118 U.S. 256 (1886) (concluding that noncitizens are protected by the Fourteenth Amendment); *Wong Wing v. United States*, 163 U.S. 228 (1896) (holding that the Fifth and Sixth Amendments prohibit punishing noncitizens without a trial); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (stating that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection"); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that even persons here unlawfully are guaranteed Fifth and Fourteenth Amendment due process).

79. See *supra* text accompanying notes 15-17.

80. The Chinese exclusion cases clearly established this principle. See *supra* text accompanying notes 9-25.

81. See *COLE & DEMPSEY*, *supra* note 40, at 117-26.

82. See *supra* text accompanying note 21-25.

83. See *supra* text accompanying notes 31-32.

84. The government's argument in *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685 (6th Cir. 2002), relied heavily on the plenary power doctrine. Given that the Supreme Court has always held that the plenary power doctrine is an extension of the government's inherent power to protect the national security, it will also be relevant if, as Attorney General John Ashcroft and others have implied, the government decides to implement concentration camps domestically. See Jonathon Turley, *Camps for Citizens: Ashcroft's Hellish Vision; Attorney general shows himself as a menace to liberty*, L.A. TIMES, Aug. 14, 2002, at B11.

Congress to revoke some of the most egregious provisions of the 1996 IIRIRA<sup>85</sup> or the 2001 USA PATRIOT Act which, among other things, gives the attorney general additional power to detain and deport immigrants.<sup>86</sup> While this might provide some immediate relief, such an approach does not resolve the underlying problems created by the plenary power doctrine. To see the inadequacy of such an approach, it is helpful to consider the plenary power doctrine in its broader context, a context which is discussed in this section.<sup>87</sup>

The same Supreme Court that decided the Chinese exclusion cases and which, not coincidentally, also upheld American apartheid in *Plessy v. Ferguson*,<sup>88</sup> made the plenary power doctrine the cornerstone of what is referred to as “federal Indian law,”<sup>89</sup> as well as the law applied to external U.S. colonies such as Puerto Rico and Guam.<sup>90</sup> A comparative analysis of these areas of law reveals that Congress has consistently passed laws which violate fundamental human rights, and the Supreme Court has just as consistently refused to enforce otherwise applicable provisions of constitutional or international law. Thus, the plenary power doctrine has been used to abrogate the rights not only of immigrants, but of a much broader cross-section of peoples. What all these groups have in common is that while they are subject to U.S. jurisdiction, they are simultaneously regarded as “Other” - outsiders by virtue of race, ethnicity, national origin, citizenship, or some combination thereof.

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85. See *supra* note 38.

86. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). See also CHANG, *supra* note 52, at 62-66.

87. I explicate this context in more detail in Saito, *supra* note 3, at 458-67. See also ALEINIKOFF, *supra* note 3.

88. 163 U.S. 537 (1896) (holding segregated railroad coaches constitutionally acceptable under the “separate but equal” theory).

89. It is more appropriately recognized as the U.S. federal law applied to Indian matters; it certainly is not Indian law. See WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 1 (1998) (“Indian law” might be better termed ‘Federal Law About Indians.’”). For a description of some actual American Indian law, see ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997).

90. Today the United States exercises jurisdiction over about four million people in the “unincorporated territories” of Puerto Rico, the Northern Mariana Islands, the “U.S.” Virgin Islands, and “American” Samoa. FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 30, n.1 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter FOREIGN IN A DOMESTIC SENSE] (citing GAO, Report to the Chairman, Committee on Resources, House of Representatives, *U.S. Insular Areas: Application of the U.S. Constitution* (1997)). See generally, STANLEY K. LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS (1995). This population figure does not include the more than 2 million Puerto Ricans who live on the mainland and are entitled to the full protection of U.S. citizenship. See Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 232 (1996).

*A. American Indian Nations and Plenary Power*

Shortly after deciding the first of the Chinese exclusion cases, the Supreme Court held that the political branches of government also have plenary power over American Indian nations, laying the groundwork for federal laws and policies which have had a devastating impact on native communities. In 1886 the Court upheld the Major Crimes Act<sup>91</sup> in *United States v. Kagama*,<sup>92</sup> which for the first time extended federal criminal jurisdiction to Indian reservations. The Supreme Court declared that American Indian nations were not truly sovereign, but merely “semi-independent” with limited authority over their “internal and social relations.”<sup>93</sup> The following year Congress passed the Allotment Act,<sup>94</sup> also known as the Dawes Act, “extinguishing Indian tribal lands, allotting the same in severalty among those entitled to receive them, and distributing Indian tribal funds.”<sup>95</sup> Indians who accepted allotments were also forced to accept U.S. citizenship, and the “surplus” land was sold to white settlers. Despite widespread American Indian resistance to allotment, this policy resulted in the loss of 90 million acres or two-thirds of all Indian-held land between 1887 and 1934.<sup>96</sup>

The Allotment Act was legally challenged by Lone Wolf, a Kiowa band chief, who asserted that the Act violated both the due process clause of the Fifth Amendment and the 1867 Treaty of Medicine Lodge, which provided that any alienation of Kiowa land required the consent of three-quarters of the nation’s adult men.<sup>97</sup> In 1903, in *Lone Wolf v. Hitchcock*, the Supreme Court upheld the Act, using the last-in-time rule as it had in *Chae Chan Ping* to avoid enforcing the treaty.<sup>98</sup> On the constitutional claim, it projected the reasoning of *Kagama* back to the beginning of U.S. jurisprudence with the counter-factual argument that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”<sup>99</sup>

91. Major Crimes Act, § 9 of Indian Appropriation Act, 23 Stat. 385 (1885).

92. 118 U.S. 375 (1886).

93. *Id.* at 381-82.

94. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887).

95. *Seminole Nation v. United States*, 78 Ct. Cl. 455, 466 (1933).

96. See BLUE CLARK, *LONE WOLF V. HITCHCOCK, TREATY RIGHTS & INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 2* (1994) (“After removal from their homelands earlier in the century, allotment was the most traumatic federal policy affecting Indian people.”). See also DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 65-117* (1997). In other challenges to the Allotment Act, the Court held that the plenary power allowed Indian property, even land held in fee simple, to be “subject to the administrative control of the government,” *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902), due to the Indians’ “condition of dependency,” *Stephens v. Cherokee Nation*, 174 U.S. 445, 488 (1899).

97. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

98. *Id.*

99. *Id.* at 565.

Just as the government today relies on the plenary power doctrine enunciated in the Chinese exclusion cases to allow the use of secret evidence and the indefinite detention of immigrants, the plenary power doctrine justified the federal government's holding of American Indian resources in trust, acting as "guardian" for its Indian "wards."<sup>100</sup> Using this trust authority, the Department of the Interior continues to dramatically limit the exercise of American Indian sovereignty, claiming the right to recognize (or not recognize) American Indian nations, approve tribal constitutions and elections, and apply "blood quantum" rules to determinations of individual Indian identity.<sup>101</sup>

The Department of the Interior also controls leases of the land and mineral wealth of Indian nations, often allowing large corporations to obtain such leases for as little as ten percent of their market value.<sup>102</sup> The proceeds from these leases are then held "in trust" by the government. Although this system is supposed to exist for the benefit of American Indians, it has consistently been used to their detriment, as illustrated by the fact that the Interior Department has recently been sued for losing literally billions of dollars of these trust funds.<sup>103</sup> The end result of this exercise of plenary power over the affairs of American Indian nations is that Indian communities, which nominally own vast amounts of natural resources and should as a result be the richest subgroup in the population have, in fact, the lowest incomes of any sector of the U.S. population. As a direct result, they suffer unemployment rates of sixty to ninety percent as well as the lowest life expectancies, highest infant mortality, and the highest rates of death from exposure, communicable diseases, alcoholism, and suicide of any group in the United States.<sup>104</sup>

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100. This comes from Justice Marshall's assertion in *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) that American Indian nations are "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian."

101. See generally Ward Churchill, *The Crucible of Indian Identity: Native Traditions versus Colonial Imposition in Postconquest North America*, 32 AM. INDIAN CULT. & RES. J. 39 (1999); GAIL K. SHEFFIELD, *THE ARBITRARY INDIAN: THE INDIAN ARTS AND CRAFTS ACT OF 1990* (1997); VINE DELORIA, JR. & CLIFFORD LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (1984).

102. See, e.g., Ward Churchill, "Genocide in Arizona: The 'Navajo-Hopi Land Dispute' in Perspective," in WARD CHURCHILL, *STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION* 177 (1999) (quoting estimates that the U.S. government was attempting to pay the Shoshone less than one penny of actual value for each acre taken in Newe Segobia).

103. See *Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999) (holding Secretaries of Interior and Treasury in contempt for failing to produce documents relating to an alleged \$4 billion of missing trust funds), *aff'd sub nom. Cobell v. Norton*, 240 F.2d 1081 (D.C. Cir. 2001). The plaintiffs allege that as much as \$10 billion may be missing. See John Gibeaut, *Another Broken Trust*, A.B.A. J., Sept. 1999, at 40. See generally, Billee Elliott McAuliffe, *Forcing Action: Seeking to "Clean Up" the Indian Trust Fund: Cobell v. Babbitt*, 25 S. ILL. U. L.J. 647, 656 (2001) (discussing class action lawsuit for an accounting of the government's mismanagement of Indian assets).

104. See Rennard Strickland, *Buffalo Herd*, in RENNARD STRICKLAND, *TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY* 53 (1997).

### B. U.S. Colonies and Plenary Power

The plenary power doctrine has also been invoked by the Supreme Court to avoid extending constitutional protections to the residents of external U.S. colonies. In 1901, the Court held in *Downes v. Bidwell*,<sup>105</sup> the first of what are referred to as the Insular Cases,<sup>106</sup> that the Constitution need not “follow the flag” to the newly acquired territories of Puerto Rico, Guam or the Philippines. Efren Rivera Ramos summarizes Justice Brown’s opinion:

“The power to acquire territory by treaty,” [Justice Brown] affirmed, “implied not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the ‘American Empire.’” In sum, the plenary power of Congress arose from the inherent right to acquire territory, the Territorial Clause [of the Constitution], the treaty-making power, and the power to declare and conduct war. The Constitution applied to the territories only to the degree that it was extended to them by Congress.<sup>107</sup>

As recently as 1996, the House Committee on Resources found that the “compact” currently governing U.S.-Puerto Rican relations does not meet the United Nations’ standards for self-government and that Congress still holds the power to unilaterally revoke local self-government and U.S. citizenship as long as it meets the still undefined “fundamental rights test” of the Insular cases.<sup>108</sup> Thus, the plenary power doctrine is currently used to justify the perpetual limbo in which Puerto Rico and the so-called U.S. territories are held, with no assurance that they will ever be given the chance to determine their political status for themselves.<sup>109</sup> U.S. control of these territories has also ensured their use for U.S. military purposes, including the ongoing and highly controversial naval bombardment of Puerto Rico’s Vieques Island.<sup>110</sup> It has allowed continuing economic and

105. 182 U.S. 244 (1901).

106. While there is some dispute over which cases constitute the “Insular Cases,” there is general agreement that they start with *Downes* and go through *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922), which held that the Jones Act, 39 Stat. 951 (1917), which conferred U.S. citizenship but not representation on Puerto Ricans, did not “incorporate” Puerto Rico into the United States. For an excellent in-depth analysis of these cases, see Rivera Ramos, *supra* note 90. See also EFREN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* 71-142 (2001).

107. Rivera Ramos, *supra* note 90, at 246-47 (citing *Downes*, 182 U.S. at 280).

108. Jose Trias Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. U.P.R. 1, 16 (1999) (citing House Comm. on Resources, Report 104-713, part I, United States-Puerto Rico Political Status Act, to Accompany H.R. 3024, 104th Cong., 2d Sess. 14 (1996)).

109. See FOREIGN IN A DOMESTIC SENSE, *supra* note 90, at 12 (“The unincorporated territories were denied even the promise of any final status, either within the constitutional framework or outside of it. They were subjected not only to an unequal condition but to absolute uncertainty concerning their ultimate status – uncertainty about who they were, where they belonged, and what their future held.”).

110. See Raymond Hernandez, “*A Tiny Island, but a Cause So Celebre: From New York to*



ecological exploitation by permitting U.S. corporations to gain the tax benefits of operating in U.S. territory without having to comply with otherwise applicable environmental or labor laws.<sup>111</sup>

In assessing federal law and policy with respect to immigration matters and jurisdiction over American Indian nations and external territories, the Supreme Court has relied upon the plenary power doctrine in refusing to extend the protections of the U.S. Constitution to these areas. At the same time, it has refused to recognize or enforce otherwise applicable provisions of international law. The result is a myriad of continuing injustices. What are the legal options open to lawyers and legal scholars concerned with remedying such injustices?

## V. REMEDYING THE WRONGS: LEGISLATIVE AND CONSTITUTIONAL OPTIONS

### A. Legislative Remedies

In *Downes v. Bidwell*, Justice Brown, who just five years earlier had written the Court's opinion upholding legalized segregation in *Plessy v. Ferguson*,<sup>112</sup> said that we should not worry about the possibility of despotism resulting from the exercise of plenary power because "there are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests."<sup>113</sup>

As evidence that Congress could be counted on to act in good faith, Justice Brown pointed out that only once had the Court had to overturn Congressional action in the territories. That instance, he noted, was *Scott v. Sandford*.<sup>114</sup> In that case, Justice Taney held that Dred Scott, an enslaved African American suing for his freedom, could not invoke the jurisdiction of the federal courts because he was not a citizen of either Missouri or the United States, or even a person under the law. Justice Taney went on to declare the Missouri Compromise invalid on the ground that Congress could not prevent citizens from taking their "property," *i.e.*, slaves, from one U.S. jurisdiction to another.<sup>115</sup> Needless to say, this provides scant

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*Hollywood – Vieques Has Issues for Everyone*, N.Y. TIMES, July 15, 2001, at 25.

111. See PEDRO A. CABAN, CONSTRUCTING A COLONIAL PEOPLE: PUERTO RICO AND THE UNITED STATES, 1898-1932 250-54 (1999); Trias Monge, *supra* note 108, at 19. On the use of sweatshops in these territories, see William Branigin, "Top Clothing Retailers Labeled Labor Abusers; Sweatshops Allegedly Run on U.S. Territory," WASH. POST, Jan. 14, 1999, at A14. See generally Deborah J. Karet, *Privatizing Law on the Commonwealth of the Northern Mariana Islands: Is Litigation the Best Channel for Reforming the Garment Industry?*, 48 BUFF. L. REV. 1047 (2000).

112. 163 U.S. 537 (1896).

113. 182 U.S. 244, 280 (1901).

114. 60 U.S. 393 (1856).

115. *Id.* at 452.

comfort to those who are supposed to rely on the “principles of natural justice inherent in the Anglo-Saxon character” for assurance that Congress will do the right thing.

Based on these and many other examples of injustices perpetrated by law and executive action against immigrants, American Indians, and residents of U.S. colonies, it seems clear that relying on better legislation to remedy the harm perpetrated by the exercise of its plenary power has not proven sufficient. We must bear this in mind as we consider how to respond to the current treatment of Muslim and Arab or Middle Eastern immigrants, as well as the on-going injustices toward other immigrants, American Indian nations, and the residents of unincorporated U.S. “territories.”

### B. Constitutional Remedies

Another solution often proffered to remedy the harm that results from the unfettered exercise of power is to limit it by extending constitutional protection to those groups currently subjected to plenary power.<sup>116</sup> If the Constitution were interpreted to apply fully to these groups, the situation of many individuals would improve in many respects. Permanent residents would at least be assured of due process and equal protection in deportation cases. Residents of U.S. colonies would have the protection of U.S. environmental and labor laws.

There are, however, a number of reasons why this solution is inadequate. First, when we consider the extent to which the plenary power doctrine is used against this wide range of peoples considered “Other,” we see that this is a deeply rooted, structural aspect of American jurisprudence that is not going to be changed easily. The courts, for example, are unlikely to discard the plenary power doctrine in the context of immigration law when that would risk undermining the entire structure of the law governing American Indian nations or call into question the legitimacy of U.S. control over its external “possessions.”

Second, even if the peoples currently subjected to the plenary power of the U.S. government were accorded full constitutional rights, this may not be sufficient to remedy the injustices at issue. African Americans have also been deemed “Other” in American history and jurisprudence. Prior to the Civil War, they were subjected to the plenary authority of state and local governments, as illustrated by Justice Taney’s statement in *Dred Scott*

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116. See, e.g., Motomura, *supra* note 7, at 549-50 (noting with approval that courts have used “phantom” constitutional norms in “subconstitutional,” i.e., statutory and regulatory, decisions to gradually introduce constitutional constraints into immigration decisions); Comment, *Federal Plenary Power in Indian Affairs after Weeks and Sioux Nation*, 131 U. PA. L. REV. 235 (1982) (advocating the “constitutionalization” of federal Indian law); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985) (advocating elevation of Puerto Ricans to full equality through statehood).

that people of African descent, whether or not enslaved, were “so far inferior, that they had no rights which the white man was bound to respect.”<sup>117</sup> After passage of the Thirteenth,<sup>118</sup> Fourteenth,<sup>119</sup> and Fifteenth Amendments<sup>120</sup> African Americans were supposed to have the full and equal protection of the laws and all of the constitutional guarantees of the Bill of Rights. However, what we have seen from the sanctioning of segregation in *Plessy v. Ferguson*<sup>121</sup> to the dramatic racial disparities in the current enforcement of criminal laws,<sup>122</sup> is the emergence of a parallel and unequal system of law rather than the full extension of constitutional protections.<sup>123</sup> To the extent that the Constitution currently applies to immigrants, American Indians, and Latinos, these groups also suffer from consistent patterns of unequal treatment.<sup>124</sup> Thus, extending the theoretical application of constitutional rights provides only limited assurance that underlying inequities will be addressed.

Finally, the full extension of constitutional rights, even if effective, would not necessarily be the appropriate remedy for many of the problems identified above. Within the realm of those subjected to the plenary power doctrine, immigrants would probably benefit the most from full constitutional protection. However, even in that arena, the courts would have to develop a jurisprudence that addresses the regulation of immigration as an exercise of U.S. sovereignty, a subject about which the Constitution is silent.<sup>125</sup> Furthermore, as we have seen, the doctrine is not limited to immigration law. The bringing of Indian nations and external colonies under the umbrella of the Constitution does not address the most fundamental wrongs at issue – the abrogation of their sovereignty and the denial of their right to self-determination. Unilateral extension of constitutional protections to Puerto Ricans would do nothing to allow them to determine their political future,<sup>126</sup> just as the imposition of U.S.

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117. *Dred Scott*, 60 U.S. at 407.

118. U.S. CONST. amend. XIII (abolishing slavery except as punishment for those convicted of crimes).

119. U.S. CONST. amend. XIV (recognizing birthright citizenship and prohibiting states from denying anyone due process or equal protection of the law on account of race).

120. U.S. CONST. amend. XV (forbidding states from interfering with the right to vote on account of race).

121. 163 U.S. 537 (1896).

122. See generally DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996).

123. See generally A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996).

124. See generally, PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2000).

125. See generally ALEINIKOFF, *supra* note 3; Motomura, *supra* note 7; Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255.

126. See generally FOREIGN IN A DOMESTIC SENSE, *supra* note 90; Trias Monge, *supra* note 108.

citizenship on American Indians did nothing to address the problem of broken treaties and stolen land.<sup>127</sup>

As noted above, the extensive reach of the plenary power doctrine indicates that it is a cornerstone of American jurisprudence, not just an aberrational aspect of the law. Although concerns of “territorial sovereignty” and “national security” have been consistently invoked as the underlying rationale for the doctrine,<sup>128</sup> the plenary power doctrine has most frequently been applied to groups who are subject to U.S. jurisdiction but who at the same time have the least ability to ensure that their rights are protected. While the rights and interests of immigrants are represented in theory by other sovereigns, given the United States’ hegemony in world affairs, those states are relatively powerless to influence U.S. immigration policy. The United States has stripped both American Indian nations, which are essentially internal colonies, and external territories such as Puerto Rico and Guam of the ability to exercise their sovereignty. To argue that the U.S. government must have plenary power to protect itself from threats posed by these peoples is to turn reality on its head. Simply because these groups are all perceived as “outsiders” does not mean that they are a threat to the national security.

## VI. THE POTENTIAL OF INTERNATIONAL LAW

The United States has long claimed to be a “nation of laws, not of men,”<sup>129</sup> and prides itself on promoting the global rule of law.<sup>130</sup> Yet, under the rubric of the plenary power doctrine, the government has consistently violated fundamental principles of law and the Supreme Court has refused to invoke the Constitution to limit its actions. We must recognize that American jurisprudence incorporates not only what is covered by the Constitution, but extends to all the areas where the executive acts, Congress legislates, and American might enforces. If the United States is not simply engaging in an exercise of raw power, then the courts must recognize and enforce international law with respect to all

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127. For critiques of the plenary power doctrine as applied to American Indian nations, see generally Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); WILKINS, *supra* note 96; Churchill, *supra* note 101.

128. It is interesting to note that military affairs are the other major area of substantive law where the plenary power doctrine is routinely invoked. See *Parker v. Levy*, 417 U.S. 733 (1974) (holding that an officer’s statements opposing the Vietnam war were not protected by the First Amendment); Captain John A. Carr, USAF, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A. F. L. REV. 303 (1998).

129. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

130. Thus, to note just one example, then-U.S. Secretary of State James Baker told the Conference on Security and Cooperation in Europe in 1991 that the criteria to be considered in the recognition of new states included support for democracy and the rule of law, the safeguarding of human rights, and respect for international law and obligations. HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 250 (3rd ed. 1993).

matters deemed “extraconstitutional.”

As noted above, the Supreme Court’s justification for the exercise of plenary power is that the power is inherent in sovereignty.<sup>131</sup> But what is sovereignty, if not a mutual recognition by states and nations of their right to control certain matters within their jurisdiction? To the extent that it is something more than “might makes right,” sovereignty derives its power from inter-state relations, the realm of international law, and has no legitimate meaning outside of that realm. International law consists, in essence, of the mutual recognition of sovereignty and in the equally mutual recognition of limitations on that sovereignty.<sup>132</sup>

The Constitution declares treaties to be part of the supreme law of the land<sup>133</sup> and, despite the many judicial doctrines that have been created to avoid doing so, the Supreme Court has frequently acknowledged its obligation to enforce international law. As it stated in 1900 in *The Paquete Habana*, “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”<sup>134</sup> In his essay, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, Professor Louis Henkin concludes:

Other free countries increasingly have subordinated domestic institutions and parochial ways to help achieve greater effect for agreed international norms. Now is hardly the time for the United States, aspiring to lead the struggle for the rule of law in a disorderly world, to retreat further into unilateralism by distorting our jurisprudence and encouraging our institutions to pay less, rather than more, respect to the law of nations.<sup>135</sup>

There is, in fact, an abundance of international law addressing all of the issues raised by application of the plenary power doctrine. Most

131. See *supra* text accompanying notes 15, 17. See also Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 855-58 (1987).

132. See Brierly, *The Law of Nations* 54-55 (1963), reproduced in HENKIN ET AL., *supra* note 130, at 13-14 (“we have allowed ourselves to be persuaded that the fact of sovereignty makes it necessary to look for some specific quality, not to be found in other kinds of law, in the law to which states are subject. . . . But this assumed condition of states is the very negation of law.”); Henkin, *International Law: Politics, Values and Functions*, 216 Rec. des Cours 24-28 (1989-IV), reproduced in HENKIN ET AL., *supra* note 130, at 15-16 (“Sovereignty . . . is often a catchword, a substitute for thinking and precision. . . . By their ability to consent to external authority and to conclude agreements, [states] have created norms and institutions to govern these relations, the international law of the system. Only States can make law for the system but nothing suggests that they can make law only for themselves.”).

133. U.S. CONST. art. VI, § 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land). See Henkin, *supra* note 131, at 866-77 (commenting on the assumptions of the Framers that the United States was bound by international law, and that customary law was accorded a higher status than treaties).

134. 175 U.S. 677, 700 (1900).

135. Henkin, *supra* note 131, at 886.

important with respect to American Indian nations and external colonies, this includes law – acknowledged by the United States as binding<sup>136</sup> – which recognizes the right of all peoples to self-determination<sup>137</sup> and mandates decolonization.<sup>138</sup> In addition, there is a large body of emerging international law with respect to the rights of indigenous peoples, specifically acknowledging their rights to maintain their cultural integrity and to control their lands and natural resources.<sup>139</sup> Current U.S. policies clearly violate international law in each of these areas.<sup>140</sup>

With respect to immigration matters, international law articulates specific rights of immigrants and asylum seekers.<sup>141</sup> The law also requires states to respect all persons' rights to due process, which include access to the courts and to fair trials,<sup>142</sup> and the prohibition of arbitrary detention.<sup>143</sup> One of the most fundamental of all human rights is to be free from discrimination based on race, ethnicity, national origin, religion and gender.<sup>144</sup> Immigration law as currently enforced puts the United States in

136. According to the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. 1, ch. 1 (1987), "International law is law like other law, promoting order, guiding, restraining, regulating behavior. . . . It is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts."

137. See, e.g., U.N. CHARTER art. 1, para. 2, 59 Stat. 1031, T.S. 93, 3 Bevans 1153 (noting the "principle of equal rights and self-determination of peoples"); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 art. 1 (entered into force for the U.S. Sept. 8, 1992) ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.")

138. See, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR 15th Sess., Supp. No. 16, at 66-67, U.N. Doc. A/4684 (1960) (noting that "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory" and proclaiming the "necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations").

139. See, e.g., UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTIONS OF MINORITIES, DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES; REVISED WORKING PAPER SUBMITTED BY THE CHAIRPERSON-RAPPORTEUR, MRS. ERICA-IRENE DAES, U.N. Doc. E/CN.4/Sub.2/1993/26 (1993). For a history and compilation of related documents, see SHARON HELEN VENNE, OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS RIGHTS (1998).

140. See generally Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51 (1991); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660 (1990).

141. See, e.g., Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. The United States has neither signed nor ratified this treaty, but it is binding by virtue of the U.S. ratification of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (U.S. ratified with 2 reservations).

142. See, e.g., International Covenant on Civil and Political Rights, *supra* note 137, at arts. 9, 10, 14, 15.

143. *Id.* at art. 9.

144. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (1966) (entered into force for the United States Nov. 20, 1994); See also U.N. CHARTER, *supra* note 137, art. 1; International Covenant on Civil and Political Rights, *supra* note 137, art. 2.

violation of each of these provisions.

In addition to the violations of international law embodied in U.S. immigration law as generally enforced, many of the government's post-September 11 actions have resulted in further and more egregious violations.<sup>145</sup> Not only do these actions discriminate on the basis of national origin, race, religion, and/or gender, they contravene guarantees made by the United States regarding the right to freedom of speech, political belief, and association; the right to be free from arbitrary arrest, detention, and torture; the right to due process and access to the courts, and the right to political asylum.<sup>146</sup> With respect to those being held as "unlawful combatants" in Guantanamo Bay or in U.S. military prisons, the United States is also violating long-established international norms pertaining to the rights of persons captured in war.<sup>147</sup>

If the United States is to claim the prerogatives of a sovereign state, it has a fundamental obligation to comply with international law in all of its actions. When confronted with their reluctance to acknowledge that human rights law binds the United States, government officials often justify their assertion of American exceptionalism by claiming that the Constitution provides "even more" protection than that afforded by international law.<sup>148</sup> The inadequacy of this response is most obvious where the government is deemed to have plenary power, for in these areas of jurisprudence the Supreme Court has explicitly refused to enforce those very constitutional protections.

#### CONCLUSION

The plenary power doctrine was first articulated in the Chinese exclusion cases to allow the government to exclude a disfavored minority who were portrayed as outsiders by virtue of their race, ethnicity, national origin or culture, and to deny them otherwise applicable protections of law.

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145. For a detailed analysis of the violations of international law involved in these actions, see Saito, *supra* note 72.

146. See text accompanying notes 52-78 *infra*.

147. See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. All are available at <http://www.icrc.org/ihl.nsf/WebCONVFULL?OPENVIEW>.

148. This is the explanation most frequently offered for the U.S.'s frequent refusal to ratify human rights treaties and, in the treaties it does ratify, its insistence on reservations which essentially limit U.S. compliance to that already required by the Constitution. See generally FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS 34-49 (2nd ed. 1996).

In so doing, the Supreme Court called upon the powers it claimed to be inherent in sovereignty, and portrayed the government's actions as essential to its ability to protect the country against external threats. These justifications have been called upon to exclude other disfavored groups of noncitizens, including those deemed a threat by virtue of their presumed ideology or political affiliations, and to exercise unrestricted power over American Indian communities and the residents of external U.S. colonies.

The law embodied in the Chinese exclusion cases is very much alive and well today. To quote Professor Henkin again,

[The] principal doctrines announced in Chinese Exclusion have come back to haunt us one hundred years later. The courts . . . still hold that the Constitution provides no protection against abuses in the regulation of immigration – abuses that include arbitrary detention depriving thousands of their liberty without due process of law. International human rights law has developed to help prevent such harms, but the executive branch has not seen fit to respect this law, and the courts have not yet ordered the executive to do so.<sup>149</sup>

Even if, at this moment in history, the unlimited powers given the government under the plenary power doctrine are focused on “outsiders” who are not of Asian descent, we know that they can, and often have been, turned back on Asian Americans.<sup>150</sup> We cannot afford to sit back and feel comfortable with the “progress” made by some of our communities, but must use the knowledge we have gained from our experiences with American law to effect the kinds of structural changes necessary to make all who are potentially deemed “Other” more secure.

When we see the plenary power of the government being asserted in some of the ways described above, including the government's current treatment of Muslim and Arab American immigrants, it is not enough to respond by advocating better laws or more humane administrative policies. As lawyers and legal scholars, we have a responsibility to call into question the broader framework of American jurisprudence that allows such injustices to be perpetuated and to insist that the U.S. courts enforce the protections spelled out, not only in the Constitution, but in international law as well.

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149. Henkin, *supra* note 131, at 885-86.

150. See generally Spencer K. Turnbull, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 ASIAN PAC. AM. L.J. 72 (2001); Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000); Terri Yuh-Lin, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 ASIAN L.J. 69 (2000); ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* (1999); ANGELO ANCHETA, *RACE, RIGHTS AND THE ASIAN AMERICAN EXPERIENCE* (1998).