Washington and Lee Journal of Civil Rights and Social Justice

Volume 30 | Issue 2 Article 15

Spring 2024

The Witch-Hunt for Spies - A Critique of the China Initiative and National Security's Outsized Influence in Equal Protection Analysis

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Abstract

The U.S. Government has increased its focus on Chinese espionage in the last decade in a randomized and unpredictable way. Primarily targeting Chinese scientists and academics, the "China Initiative" has resulted in widespread targeting of individuals based on their race, ethnicity, and national origin. The program was formally terminated and said to now be a part of a broader approach to nation-state threats. However, the outcomes and effect of the economic espionage charges in the last 15 years has greatly skewed towards prosecuting Chinese individuals irrespective of the name of the program. While protections typically exist in the law to protect against targeting based on race, ethnicity, or national origin, the Government has consistently prevailed against civil rights claims tangentially related to national security. The Note examines the China Initiative, proposes a need to rewrite strict scrutiny analysis in Equal Protection Claims related to national security, and calls on civil rights advocacy groups to combat the new, more expanded economic espionage act as a violation of the Fourteenth and Fifth Amendment as discrimination under national origin and race.

* J.D. Candidate, May 2023, Washington and Lee University. As the daughter of two immigrants who have dedicated the last 20 years of their life to educating medical students and cancer research, my Note is a solution geared toward the real fear and concern I witnessed in my community. I am thankful to W&L Law for providing me with the tools and education to turn those fears into progress. Additionally, I would like to thank my note advisor, Professor Baluarte, for his help in developing my ideas. Last but not least, I am incredibly grateful to my family and close friends for their unwavering support and love.

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I. *Introduction*

Spies. Espionage. Trade Secret Theft. What sounds like the plot of an all-American spy movie are words that have spread fear into the hearts of Chinese immigrants and Chinese American scientists residing in America.[1] In November 2018, the Trump Administration, led by Jeff Sessions, the then-Attorney General, launched the "China Initiative."[2] The goal was to crack down on trade secret theft, hacking, and economic espionage.[3] The Department of Justice's National Security Division managed the Initiative in conjunction with the FBI and other federal agencies.[4] After nearly three years, the program proved to be ineffectual, and a majority of the charges were for minor errors in federal grant applications for research.[5] What it did accomplish was establishing a harmful political rhetoric that is anti-Chinese and Sinophobic.[6] Chinese and Chinese American individuals who were targeted lost their jobs, their freedom, and had their whole lives turned upside down by meritless accusations.[7] While the China Initiative "ended" in February of 2022 due to the program "drifting" from its original goal, the Biden Administration has promised to continue the actions under the Initiative without "the focus[] on one nation."[8] In

1. *See infra* Part IV.B. (highlighting the disorder and chaos the China Initiative has caused in the lives of Chinese immigrants and Chinese American scientists through meritless prosecutions).

2. *Attorney-General Jeff Sessions Announces New Initiative to Combat Chinese Economic Espionage*, U.S. DEPT. JUST. (Nov. 1, 2018) [perma.cc/N2G8-QALV].

3. *Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018*, U.S. DEPT. JUST. (last updated Nov. 19, 2021) [perma.cc/62HD-DZ3Y].

4. *Id.*

5. *See* Sheridan Prasso, *China Initiative Set Out to Catch Spies. It Didn't Find Many*, BLOOMBERG (Dec. 14, 2021) (citing a Bloomberg News analysis of the 50 indictments announced or unsealed since the start of the program that shows that none of the cases were about spies and only 20% dealt with economic espionage) [perma.cc/MYP5-8Y78].

6. *See infra* Part IV.B.

7. *See infra* Part IV.B.

8. Michael German, *End of Justice Department's 'China Initiative' Brings Little Relief to U.S. Academics,* BRENNAN CTR. FOR JUST. (Mar. 25, 2022) [perma.cc/6WLB-G88B].

other words, the government has simply removed the name and broadened the scope.[9]

Despite this intentional targeting of race and nationality, as of writing this Note, there is no ongoing litigation challenging the constitutionality of the China Initiative. Instead, non-profit organizations and advocacy groups have submitted amicus briefs in support of Chinese individuals who have been targeted by the Initiative.[10] Non-profits and civil rights advocacy groups likely have not challenged the constitutionality of the China Initiative due to the amount of judicial deference given to the government for claims of national security, and the muddled, inconsistent applications of the levels of scrutiny in cases like this.[11] Instead, other persuasive advocacy was pursued, such as sending in petitions or letters to President Biden and United States Attorneys.[12]

This Note analyzes the China Initiative under the Equal Protection Clause and the legal challenges to a successful Equal Protection claim. Part II provides a history of government actions targeting Asian populations.

Part III details the current rhetoric and political attitudes towards Chinese and Asian individuals fueling the implementation of the China Initiative.

Part IV discusses the concept of "economic espionage" and highlights the data behind the government's progressive targeting

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9. *See id.* ("[Assistant Attorney General] Olsen made clear that the Justice Department and FBI will continue investigating economic espionage by China and other nation-states, but without a program specifically focused on one nation . . . .").

10. *See, e.g.*, Brief for Asian Americans Advancing Justice, et al. as Amici Curiae Supporting Appellant, Xiaoxing Xi v. Haugen, CV 17-2132, 2021 WL 1224164 (E.D. Pa. 2022) (documenting racial bias against persons of Chinese descent in brief for Professor Xi); Brief for Asian Americans Advancing Justice, as Amici Curiae Supporting Defendant, United States v. Feng Tao, No. 19-20052-JAR, 2022 WL 252019 (D. Kan., 2022) (highlighting the broad investigation of Chinese American scientists without any indication of wrongdoing in brief for Dr. Feng "Franklin" Tao).

11. *See infra* Part V.A. (providing the legal rationale of cases that have evaded strict scrutiny).

12. *See Expertise,* ASIAN AMS. ADVANCING JUST. (displaying links to petitions to President Biden to end the "China Initiative" and to an Acting United States Attorney for the Easten District of Tennessee to drop charges against Dr. AnMing Hu) [perma.cc/SS49-765S].

of Chinese and Asian individuals under the Economic Espionage Act of 1996. On the backdrop of the EEA, this section then showcases the similarities and effects of the China Initiative.

Part V defines the levels of scrutiny used by Courts under the Fourteenth Amendment and Fifth Amendment equal protection clause and the historical downfalls of the levels of scrutiny.

Part VI provides solutions to these challenges. First, the Note advocates for a new test the government must meet to claim national security in response to constitutional violation claims, and a more stringent standard for strict scrutiny. Second, the Note calls on civil rights advocacy groups to challenge the formally "ended" China Initiative and the government's continuation of investigations under the guise of economic espionage on equal protection grounds as a vehicle to change prior precedent and as an opportunity for the court to overturn *Korematsu* in whole.

II. The Government's History of Targeting Asian and Chinese Populations

Chinese immigrants first migrated to the U.S. in the 1850s to work in the gold mines and, later, in the agricultural and garment industries.[13] In 1863, driven by the U.S. government's desire to connect the developed eastern half of America to the less developed western half, construction on the Transcontinental Railroad began.[14] While the railroad had wide support, there was a significant lack of workers among America's white laboring class was unwilling to undertake the dangerous and grueling work of building the railroad.[15] By 1865, the railroad companies were desperate for workers.[16] Struggling to retain white workers, railroad companies began to recruit abroad, particularly focusing

13. *See Chinese Immigration and the Chinese Exclusion Acts*, DEP'T STATE OFF. HIST. ("In the 1850s, Chinese workers migrated to the United States, first to work in the gold mines, but also to take agricultural jobs, and factory work, especially in the garment industry.") [perma.cc/HC73-7JUU].

14. Lakshmi Gandhi, *The Transcontinental Railroad's Dark Costs: Exploited Labor, Stolen Lands*, HISTORY (Oct. 18, 2021) [perma.cc/V538-X5K7].

15. *See id.* (describing the advertisements Central Pacific published seeking 5,000 railroad workers in January of 1865).

16. *See id.* (explaining that out of 5,000 people the railroad was seeking, only a few hundred white workers responded).

on China.[17] Railroad companies deemed Chinese workers to be "tireless workers" and "willing to work for a lower wage."[18] Eventually, the Railroad Companies codified this desire for Chinese immigrants by lobbying for the Burlingame Treaty,[19] securing the rights of Chinese individuals to freely immigrate and travel within the United States in hopes of obtaining cheap labor and workers to build the railroad.[20] Over the next few years, roughly 20,000 Chinese laborers would participate in building the Transcontinental Railroad, all while earning half of the earnings of Euro-American laborers and receiving none of the recognition for their work.[21] Their deaths were never recorded, but it is believed that as many as one thousand Chinese immigrants died from accidental explosions, snow, or rockslides to achieve the "American triumph" – the building of the Transcontinental Railroad.[22]

With the arrival of additional Chinese immigrants, anti-Chinese and Sinophobia sentiment rose across the country.[23] Chinese immigrants were scapegoated for the lack of economic opportunities across the nation, despite being invited to complete

17. *See Transcontinental Railroad*, HISTORY (last updated Sept. 11, 2019) (detailing the explicit decision to hire Chinese immigrants due to being tireless workers and willing to work under brutal working conditions) [perma.cc/V89T-MCSW].

18. Gandhi, *supra* note 14.

19. Burlingame Treaty, China-U.S., July 28, 1868, 6 T.S. 680.

20. *See* Gandhi, *supra* note 14 (describing a focus from railroad companies to recruit abroad, "focusing particularly on China"); *see also Transcontinental Railroad*, *supra* note 17 (detailing Charles Crocker, the individual who oversaw construction for the Central Pacific, and his active recruitment of Chinese individuals based on the characterization that they are "tireless workers").

21. *See* Gandhi, *supra* note 14 (explaining that Chinese workers earned between half and two-thirds of what Euro-American laborers).

22. *See id.* ("The landscape [for railroad labor] was rugged, the living conditions primitive and the weather often extreme. Harsh mountain winters brought the regular threat of avalanches, while brutal summer temperatures in the desert terrain could reach up to 120 degrees Fahrenheit, causing workers to collapse from dehydration and heat stroke.").

23. *See* Lakshmi Gandhi, *A History of Indentured Labor Gives 'Coolie' Its Sting*, NPR (Nov. 25, 2013) (describing that anti-Chinese labor sentiment was so high during railroad work and the workers were a "prime target for criticism by labor leaders, politicians and ordinary citizens, who believed the foreign laborers were depressing wages and unfairly taking jobs") [perma.cc/E7L3-TW5K].

railroad work that few white laborers wanted.[24] The economic depression of the 1870s continued to exacerbate these tensions.[25] Workers' groups began to characterize the influx of Asian workers to the United States as a "yellow peril."[26] The "Anti-Coolies Association" and "Supreme Order of the Caucasians" would run "boycotts of Chinese businesses and laborers and cause [] riots in Chinatowns across the West.[27] As the rest of the country was celebrating the Transcontinental Railroad's expansion of the American economy, the people who built it were being harassed, attacked, and pushed out of this country.[28]

A. *Page Act: America's First Restrictive Immigration Law*

Not long after the Transcontinental Railroad was built, the Page Act[29] was passed.[30] This was the nation's first restrictive immigration law.[31] The bill's intention was "to stop the flow of the

24. *See Lesson Fifteen: Industrialization, Class, and Race; Chinese and the Anti-Chinese Movement in the Late 19th-Century Northwest*, U. WASH. CTR. FOR STUDY PAC. NORTHWEST ("Beginning in the early 1850s in California, and then continuing in other times and places in the West, white workingmen protested that the Chinese drove down wages.") [perma.cc/T4F8-BQJM].

25. *See id.* ("The animus against the Chinese and their employers grew strongest in times of economic downturns, such as during the mid-1870s and mid-1880s, when many Chinese workers involved in railroad construction were laid off.").

26. *Affidavit and Flyers from the Chinese Boycott Cases*, NAT'L ARCHIVES (last updated Oct. 11, 2017) [perma.cc/89XK-PQBZ].

27. *Id.*

28. *See* Nadja Sayej, '*Forgotten by Society' – How Chinese Migrants Built the Transcontinental Railroad*, THE GUARDIAN (July 18, 2019) (explaining the exploitation of migrant labor and the subsequent denial of their rights through acts such as the Chinese Exclusion Act and general lack of visibility and recognition of Chinese migrants for their contribution to the Transcontinental railroad) [perma.cc/7WHM-DM9C].

29. Pub. L. 43–141, § 141, 18 Stat. 477 (1875).

30. *Compare* The Page Act, Pub. L. 43–141 (enacted in 1875) *with* Sayej, *supra,* note 28 (documenting the Transcontinental Railroad's completion in 1869).

31. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005).

'yellow peril' to American shores."[32] It banned the importation of unfree Chinese laborers and Chinese women who were brought for "immoral purposes."[33] Chinese women were perceived as a threat to a "pure white America" and to American Christianity because of the stereotype that they were prostitutes.[34] The Page Act was successful in stopping the migration of Chinese women to the United States and, in turn, prevented Chinese families from forming.[35] From 1876 to 1882, immigration of Chinese women was reduced by 68% from the previous seven-year period.[36]

B. Chinese Exclusion Act: Banning Individuals of Chinese Descent

A few years after the Page Act, the Senate passed the more well-known Chinese Exclusion Act,[37] banning *all* individuals of Chinese descent from entering the country.[38] It became the first-ever U.S. immigration law to bar an *entire* ethnic group.[39] The Act prohibited Chinese Immigrants from entering the country, and prevented any person of Chinese descent from gaining citizenship for ten years.[40] When the ten years expired, the Geary Act of 1892[41] was passed, which renewed the Chinese Exclusion Laws for ten

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32. Jessica P. Rotondi, *Before the Chinese Exclusion Act, This Anti-Immigrant Law Targeted Asian Women*, HISTORY (last updated Apr. 23, 2024) [perma.cc/P4J4-ZTZ2].

33. *See id.* ("[T]he Page Act of 1875 prohibited the recruitment of laborers from "China, Japan or any Oriental country" who were not brought to the United States of their own will or who were brought for "lewd and immoral purposes.").

34. *See id.* (citing that Chinese woman "were perceived as a particular type of threat: a sexual one," "[t]hey were stereotyped as promiscuous, as prostitutes").

35. *See* Virginia Loh-Hagan et al., *Excluded from History: The Page Act of 1875,* NAT'L COUNCIL FOR SOC. STUD. (Apr. 2022) ("Even married men suffered under the Page Act, as their wives and children were subject to harsh scrutiny. Fathers were separated from their families. The Page Act thwarted both family formation and family reunification.") [perma.cc/C3DG-9PUC].

36. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 7 (1990).

37. 8 U.S.C. §§ 261–99 (1882) (repealed 1943).

38. *See Chinese Exclusion Act (1882)*, NAT'L ARCHIVES (last updated Jan. 17, 2023) ("This act provided an absolute 10-year ban on Chinese laborers immigrating to the United States.") [perma.cc/M8QV-2QLJ].

39. *Id.*

40. *Id.*

41. Pub. L. No. 52-60, 27 Stat. 25 (1892).

more years.[42] In addition to its renewal purpose, the Act required Chinese individuals in the United States to carry a Certificate of Residence to prove that they had legally entered the country.[43] The Geary Act was renewed until 1942, sixty years after the Chinese Exclusion Act was initially passed.[44]

The Chinese Exclusion Act cases were a series of harmful precedents the Supreme Court established that repeatedly upheld challenges to discriminatory laws against Chinese immigrants.[45] Amongst other troubling legacies, these cases solidified the government's plenary power to exclude or prohibit individuals from entering the United States.[46]

Most notable of these cases is *Chae Chan Ping v. United States,*[47] in which Chae Chan Ping, a Chinese laborer, was denied entry back into the United States after the Executive branch abolished the "returning laborers" status.[48] Plaintiff Ping argued that the "Certificate of Return," combined with the "returning laborers" status, was a contractual agreement between the United States, and breach of this agreement meant that Chinese

42. *See Chinese Exclusion Act (1882), supra* note 38 (expounding upon the Geary Act, which was designed to continue the Chinese Exclusion Act for 10 more years).

43. *See id.* ("[The Geary Act], made permanent in 1902, added restrictions by requiring each Chinese resident to register and obtain a certificate of residence. Without a certificate, [Chinese individuals] faced deportation.").

44. *See id.* ("In 1943, when China was a member of the Allied Nations during World War II, Congress repealed all the exclusion acts. However, quotas remained, leaving a yearly limit of 105 Chinese immigrants. Foreign-born Chinese also won the right to seek naturalization.").

45. *See* Trillium Chang, *The Chinese Exclusion Cases and Policing in the Fourth Amendment-Free Zone*, 73 STAN. L. REV. 209, 210–13 (2021) (calling the Chinese Exclusion Act cases a "stain on U.S. history").

46. *See id.*

And though those cases are now thought of as a stain on U.S. history, their lasting ulterior effects form the backbone of the American immigration system as we know it today. In the shadow of this doctrine, immigration officials are now empowered to conduct warrantless searches deep into the interior of the country.

47. 130 U.S. 581 (1889).

48. *See id.* at 582 (appealing on the denial of entry into the United States based on an act of Congress approved on October 1, 1888 that prohibited Chinese laborers from entering the United States who had departed before its passage).

immigrants with this similar status were now stranded abroad.[49] Chae Chan Ping was ultimately denied return.[50] Justice Field, writing for a unanimous court, defined the Chinese population as an "Oriental invasion" and a "menace to our civilization."[51] Justice Field then established the Plenary Power Doctrine, a deformity in our constitutional jurisprudence that is justified on the rationale that the Constitution provides Congress and the Executive with primacy over foreign policy and national security.[52]

In *Fong Yue Ting v. United States,*[53] Plaintiff Fong came to the United States with the intention of making it his permanent home.[54] Before he was able to apply for a certificate of residence, a marshal arrested him.[55] The marshal was immediately ordered, without a hearing, by a judge to deport Fong.[56] Lee, another defendant in this case, had applied to get a certificate before his arrest but he could not produce a white witness as required by the statute, so he was denied.[57] He was ordered deported.[58] Together, the defendants argued that they were denied their due process rights and the detention and deportation was invalid.[59] In the ruling, the Supreme Court extended Congress's plenary power to the deportation of permanent residents and refused to classify deportation as a punishment, resulting in a lack of rights for immigrants.[60]

Eventually, the Chinese Exclusion Act was repealed.[61] The repeal was motivated by America's need for an ally in the war against Japan.[62] This once again proves the recurring theme that

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49. *Id.*
50. *Id.*
51. *Id.* at 595.
52. *Id.* at 603.
53. 149 U.S. 698 (1893).
54. *Id.* at 703.
55. *Id.* at 705.
56. *Id.* at 706.
57. *Id.* at 707.
58. *Id.* at 735.
59. *Id.* at 703.
60. *Id.*
61. Chinese Exclusion Repeal Act of 1943, Pub. L. 78-199 (1943).
62. *See* Sylvia Chong, *'A Race So Different': Asians and Asian Americans in UVA's History*, UVA TODAY (Mar. 11, 2021) ("That legislation stood unchanged

Chinese migrants are acceptable when they are needed to benefit America. The government's creation and endorsement of anti-Chinese rhetoric resulted in dangerous living conditions for Chinese individuals, and its effects are still prevalent today.[63]

C. Executive Order 9066: The Internment of Individuals of Japanese Descent

During World War II, President Roosevelt issued Executive Order 9066,[64] which authorized the removal of people of Japanese ancestry from their homes into government-run detention camps.[65] "120,000 U.S. residents of Japanese ancestry" were removed from their homes and forced into remote detention camps on the rationale that their existence was a threat to "national security."[66] Japanese individuals were often accused of espionage or sabotage, which became the justification for the Executive Order.[67] They were subject to abysmal living conditions ripe with diseases.[68] Their spaces were poorly sanitized, and this alone resulted in the deaths of many individuals.[69] For three years, these internment camps were allowed to exist, leading to the deaths of over 1,600

until 1943, when China was a U.S. ally during World War II.") [perma.cc/M95V-AKWX].

63. *See id.* ("Even a hundred years later, there are echoes of . . . anti-coolie hostilities for current Asian[s] and Asian American[s] . . . across the country, who may hear backhanded compliments like, 'Your English is so good,' or complaints that their success in STEM fields takes away good grades and job opportunities for 'real Americans.'").

64. Exec. Order No. 9066, 28 C.F.R. § 74.3 (1942).

65. *See* Gisela P. Kusakawa, *From Japanese American Incarceration to the China Initiative, Discrimination Against AAPI Communities Must End,* AM. C. L. UNION (May 31, 2022) (highlighting the continuous racist movements the United States employed from the China Imitative to the Executive Order for the purpose of so-called "national security") [perma.cc/A3MU-YK2F].

66. *Id.*

67. *See id.* (explaining that not only were people of Japanese descent more prone to acts of espionage or sabotage but they were then reduced to numbers on tags and treated as the enemy based on their background despite a majority of them being U.S. citizens).

68. *See id.* (citing that deaths in incarceration could be attributed to infectious diseases).

69. *See id.* ("Many died in incarceration from causes including infectious diseases, bad sanitation, or even shooting by guards.").

Japanese individuals.[70] The government action landed before the Supreme Court in *Korematsu v. United States,*[71] which resulted in a 6-3 decision to uphold the exclusion of Japanese Americans from the West Coast Military Area under the rationale that national security was a compelling enough governmental interest.[72]

It was not until 1988, thirty-two years after the end of the internment camps, before Congress acknowledged that "these actions were carried out *without* adequate security reasons and without any acts of espionage or sabotage documented by the Commission [on Wartime Relocation and Internment of Civilians], and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership."[73]

In each of the Government actions targeting Chinese and Asian individuals, the law has evolved to continuously justify and protect the Government despite the enactment of the Fourteenth Amendment and Fifth Amendment.[74] The legacy of the Chinese Exclusion Act Cases continues to be a valid precedent today.[75] *Korematsu* remains an opinion that has not been fully overturned.[76] While apologies have been issued for each of these atrocious policies, legal safeguards have not been implemented to

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70. Margaret Crable, *Japanese Americans Were Forcibly Imprisoned in Camps During World War II. We Finally Know All Their Names,* U. S. CAL. DORNSIFE (Sept. 26, 2022) [perma.cc/4U5J-B9VJ].

71. 323 U.S. 214 (1944).

72. *See id.* at 218 ("Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage.").

73. Kusawaka, *supra* note 65.

74. *See, e.g*, *Korematsu*, 323 U.S. at 219–20 (holding that hardships are a part of war, and that even though the detainment of Japanese individuals violated the equal protection clause, there was a compelling government interest in detaining Japanese individuals).

75. *See* Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L. J. F. 688, 721 (2019) (identifying that the judges and scholars "have identified the [plenary power doctrine] roots in 'official racial discrimination'" but nevertheless, is still a doctrine that is continuously used in litigation).

76. *See id.* at 688 (describing *Korematsu*'s "startingly significant" ruling in *Trump v. Hawaii* which repudiated a part of *Korematsu* (mass racial incarceration) while replicating another key part (extreme judicial deference)).

ensure change.[77] The China Initiative reopens the wounds of America's past, and again scapegoating people of Chinese descent in times of economic turmoil and under the guise of national security.

III. The Rise in Anti-Asian Rhetoric in the Last Decade

"The CCP is attempting to take over the USA across all industries – pushing spies into U.S. universities and buying U.S. farmland. We must crack down on Communist China and unravel our ties." – Marsha Blackburn, U.S. Senator, Tennessee.

The "Blame Game" is a pervasive and cyclical trend in American history.[78] During times of economic downturn, public health crises, or often under the guise of national security threats, the rhetoric that politicians use and the government's actions show a directed anger and hatred towards Asians and Asian Americans.[79] The Chinese Exclusion Act was the result of scapegoating Chinese laborers for the economic downturn and labeling Chinese individuals as responsible for declining wages.[80] In 1900, a Chinese American was the first to die from the bubonic plague outbreak.[81] San Francisco responded by quarantining 25,000 Chinese people and closing non-white-owned businesses.[82] In 1942, the Federal Government detained 120,000 Japanese

77. *See* Civil Liberties Act of 1998, Pub. L. No. 100-383, 102 Stat. 903 (formal government apology and reparations); *see also* Trump v. Hawaii, 585 U.S. 667, 710 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the Constitution.") (citing Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

78. *See* STOP AAPI HATE, THE BLAME GAME: HOW POLITICAL RHETORIC INFLAMES ANTI-ASIAN SCAPEGOATING 3 (Oct. 2022) [hereinafter THE BLAME GAME] (describing the "Blame Game" as a trend where candidates and elected officials blame China for public health crises, for economic downturns and for national security concerns).

79. *See generally id.* (dissecting the public health, national security, and economic scapegoating that has traditionally occurred against Asians and Asian Americans and the current political climate).

80. *See id.* at 19 (explaining that the Chinese Exclusion Act was a result of scapegoating of Chinese laborers for declining wages and was extended through the Geary Act).

81. *Id.*

82. *Id.*

Americans after the attack on Pearl Harbor under the guise of national security.[83] In 1982, the brutal murder of Vincent Chin, a Chinese American, by two white autoworkers after being mistaken for Japanese and for "stealing" American jobs during an economic downturn in the automotive industry, highlighted the constant economic scapegoating Asian Americans face and their life or death consequences.[84] Therefore, unsurprising that words like "Kung Flu," and "Chinese virus" are among the many racist remarks spewed by politicians in 2021.[85] These words placed a target on the back of Asian Americans in the following years.[86] Between March 2020 and March 2022, more than 11,400 hate incidents against Asian Americans were reported across the United States, a dramatic increase of 339%.[87] Of the 11,400 hate incidents, 20% (2,555 hate incidents) wrongfully blamed Asian Americans for COVID-19, "espionage on behalf of the Chinese Communist Party, or economic insecurity."[88]

Language indicating that China is a "threat to America's existence" or the "singular threat to the American economy" is a part of the fabric of economic and national security scapegoating.[89] In recent years, several politicians have "engaged in rhetoric that names the Chinese Communist Party as a national security threat for espionage."[90] This is no phenomenon, as America has often painted Asian and Asian Americans as a national security threat

83. *Id.*

84. *See id.* (noting that Vincent Chin's attackers mistaken his identity and attacked him on the premise that Japanese cars were wrecking the American automotive industry).

85. *See* Katie Rogers et al., *Trump Defends Using 'Chinese Virus' Label, Ignoring Growing Criticism*, N.Y. TIMES (Mar. 18, 2020) ([T]he term has angered Chinese officials and a wide range of critics, and China experts say labeling the virus that way will only ratchet up tensions between the two countries, while resulting in the kind of xenophobia that American leaders should discourage.") [perma.cc/6H9Z-9GA2].

86. *See* THE BLAME GAME, *supra* note 78, at 4 (showing that the increase in politicians naming China as causing COVID-19 contributed to anti-Asian hate).

87. *Id.* at 3.

88. *Id.*

89. *See id*. at 10 (noting that politicians of both parties have used this type of language).

90. *Id.* at 7.

from their "perceived allegiance to foreign countries."[91] From the detainment of Japanese Americans after Pearl Harbor to the China Initiative, Asian Americans are unjustly labeled as spies or disloyal to American interests.[92] Political rhetoric is often an indicator and contributor to scapegoating that culminates in racist policies.[93] The discourse now can be seen through the language used by multiple politicians:

> The United States faces a new cold war, this time with China, that will determine the future of our nation and of the world. This cold war will turn much more on economic competition than did the first, with Soviet Russia. – Senator Tom Cotton of Arkansas (Republican)[94]
>
> China. It's definitely China. It's us vs. China . . . China is out-manufacturing us left and right. America could never be dependent on Communist China. We got to go all in. – Senator Tim Ryan (Democrat)[95]
>
> Make no mistake — China is a hostile foreign power, and every Governor has the responsibility to protect their education system, and every other entity within their purview, from the espionage and commercial theft undertaken by the Chinese Communist Party . . . China remains the biggest threat. – Governor Ron Desantis of Florida (Republican)[96]

This fear-mongering mirrors that prior to the internment of Japanese individuals.

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91. *See id.* at 8.

In the late 1990s, the federal government arrested Dr. Wen Ho Lee, a Taiwanese American scientist, and held him for 278 days in solitary confinement for unwarranted concerns of spying for China. At the end of the case, all but one count were dropped due to lack of evidence and the judge in the case took the unusual step to apologize to Dr. Lee for the government taking overly punitive measures in his case.

92. *See id.* (highlighting the similarities between the current targeting of Chinese Americans and the national security scapegoating of Japanese Americans after the attack on Pearl Harbor).

93. *See id.* at 16. (arguing that political leaders should be held responsible for rhetoric that intentional or unintentionally inflamed scapegoating due to the harm that troubling rhetoric can create).

94. *Id.* at 10.

95. *Id.*

96. *Id.*

> The continued presence of a large, unassimilated, tightly knit and racial group, bound to an enemy nation by strong ties of race, culture, custom and religion along a frontier vulnerable to attack constituted a menace which had to be dealt with. Their loyalties were unknown and time was of the essence. The evident aspirations of the enemy emboldened by his recent successes made it worse than folly to have left any stone unturned in the building up of our defenses. It is better to have had this protection and not to have needed it than to have needed it an not to have had it – as we have learned to our sorrow. – John Dewitt.[97]

> We do not propose to be made a dumping ground for enemy aliens from any other state . . . . I cannot too strongly urge that such aliens be placed in concentration camps east of the Rocky Mountains. – Sidney Osborn, Governor.[98]

Similarities between the two narratives show a troubling trend. America's desire for the fruits of Chinese labor gives way to otherization, xenophobia, and orientalism, as indicated through the China Initiative.[99]

IV. The Evolution of Economic Espionage Policies and Heavily Biased Targeting of Chinese Americans and Chinese Immigrants

Before the China Initiative, the Economic Espionage Act of 1996 was the primary vehicle to prosecute individuals for economic espionage.[100] In many ways, the Economic Espionage Act has provided the blueprint for the China Initiative and is evidence of

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97. Letter from Lt. Gen. J.L. DeWitt to the Army Chief of Staff (June 5, 1943) (on file with The Museum of the City of San Francisco).

98. *Salt Lake City Governors' Meeting*, DENSHO ENCYCLOPEDIA (last updated Oct. 8, 2020) [perma.cc/9AS3-QZPG].

99. *See* Eileen Guo et al., *The US Crackdown on Chinese Economic Espionage Is a Mess. We Have the Data to Show It*, MIT TECH. REV. (Dec. 2, 2021) ("They also demonstrate the 'disproportionate impact on Asian Americans and the immigrant community,' said Gisela Kusakawa, a staff attorney at Asian Americans Advancing Justice | AAJC, an advocacy group. 'Essentially, national security issues are being used as a pretext to target our community.'") [perma.cc/6HCZ-RPXL].

100. *See, e.g.*, Brief for Asian Americans Advancing Justice, et al. as Amici Curiae Supporting Appellant at 13–14, Xiaoxing Xi v. Haugen, CV 17-2132, 2021 WL 1224164 (E.D. Pa. Apr. 1, 2021) (describing the long history of targeting Chinese individuals for economic espionage).

the government's increased efforts to target Chinese scientists and researchers based on their ethnicity.[101]

A. Economic Espionage Act of 1996: The Evolution to the Targeting of Chinese and Asian Individuals

The Economic Espionage Act of 1996 ("EEA")[102] was originally designed to address economic espionage from all foreign governments after the Cold War.[103] However, for the last two decades, the Government has used the EEA to disproportionately prosecute those of Chinese or Asian descent, suggesting "the appearance of racial targeting."[104] Statistics from the Committee of 100 show the concerning data surrounding the EEA:

> From 1996 to 2008, people of Chinese descent represented only 16% of defendants accused of EEA crimes . . . . Since 1996, 46% of defendants charged under the EEA were accused of stealing secrets for the benefit of people or entities in China. 42% of defendants were accused of stealing secrets to benefit American people or entities.[105]

Between 2009 and 2020, 47% of individuals prosecuted for being "spies" are of Asian descent, and 38% of those cases involve those of Chinese descent.[106] Of those accused of espionage, one in three Asian Americans is found to have been falsely accused.[107] In addition to being prosecuted more and having higher rates of

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101. *See, e.g.*, Brief for Asian Americans Advancing Justice, *supra,* note 100 (describing the racial targeting under the Economic Espionage Act and worsening of the intense scrutiny and target of Chinese American scientists and researched under the China Initiative); *see also* ANDREW CHONGSEH KIM, COMM. OF 100, RACIAL DISPARITIES IN ECONOMIC ESPIONAGE ACT PROSECUTIONS: A WINDOW INTO THE NEW RED SCARE 9 (Sept. 21, 2021) (analyzing data from 190 cases and 276 defendants under the EEA between 1996 and 2020).

102. 18 U.S.C. §§ 1831–32.

103. *See* Brief for Asian Americans Advancing Justice, et al., *supra,* note 100 at 13 (increasing efforts of Governments' efforts to target Chinese American populations under EEA was prevalent since the Act's enactment).

104. *See id*. at 13–14 (highlighting the more than ten years prosecution of those with Chinese or Asian American descent).

105. Kim, *supra* note 101, at 9.

106. *Id.* at 16.

107. *Id.* at 21.

innocence, individuals who are of Asian descent (excluding Chinese defendants) received sentences twice as long as those of Western descent.[108] Those convicted of Chinese descent received 2.3 times longer sentences than those of Western descent.[109] Defendants of Asian descent were also punished "twice as harshly as others."[110] Chinese and Asian defendants were also "five times more likely to be denied bail than Western defendants."[111] These data points reveal a disturbing cause for concern; the war on China has given America a new opportunity to scapegoat Chinese and Asian individuals and criminalize their existence.[112] This is a familiar rationale in America's history–a rationale that plays a part into the creation of the China Initiative.[113]

B. China Initiative: The Meritless Targeting of Chinese Individuals

"[A]lmost every student that comes over to this country [from China] is a spy." – President Donald J. Trump, August 7, 2018.[114]

The China Initiative was created in 2018 under the Trump administration to counter "rising concerns about Chinese economic espionage and threats to US national security."[115] The

108. *See id.* at 22 (stating the average length of sentence in months for western defendants to be around 11.9 months and Asian defendants to be around 22.9 months).

109. *See id.* (noting the average length of sentence for months for Chinese defendants to be around 27.4 months).

110. *See id.* at 22. (citing 80% of defendants of Chinese descent are sent to prison while only 51% of Western defendants are sent to prison).

111. *See id.* at 24 ("Almost all defendants with Western names (98.4%) charged under the EEA were granted bail . . . . Defendants of Asian descent were denied bail in 7.5% of cases, while defendants of Chinese descent were denied bail in 8.2% of cases.")

112. *See id.* ("However, unfortunately, this study reveals significant cause for concern that the war on China has had disparate effects on ordinary American citizens of Chinese or Asian descent.").

113. *See id.* at 27 (framing the China Initiative not as a new phenomenon, but as an extension of the already existing EEA).

114. Elizabeth Redden, *Did Trump Call Most Chinese Students Spies?*, INSIDE HIGHER ED. (Aug 9, 2018) [perma.cc/Z2LV-QYBM].

115. Guo, *supra* note 99.

prosecutions, however, tell a different story.[116] The Initiative has largely targeted individuals based on "any connection to China," and increasingly targeted "research integrity" issues, rather than economic espionage and hacking.[117]

More than 77 cases prosecuted have been made public through the Department of Justice's "China Initiative" webpage and federal court records.[118] The MIT Technology Review researched and investigated these prosecutions and found troubling statistics that highlight the discriminatory nature of this Initiative.[119] For example, nearly 90% of the defendants charged under the Initiative are of Chinese heritage.[120] Many of the charges in the cases were for failure-to-disclose offenses.[121] In other words, many cases concerned mistakes or misunderstandings in applications rather than the espionage highlighted by the Trump Administration.[122]

The Initiative has profoundly affected Chinese immigrants, Chinese Americans, and the nation's scientific communities.[123]

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116. *See id.* ("Instead of focusing on economic espionage and national security, the initiative now appears to be an umbrella term for cases with almost any connection to China, whether they involve state-sponsored hackers, smugglers, or, increasingly, academics accused of failing to disclose all ties to China on grant-related forms.").

117. *See id.* ("The initiative's focus increasingly has moved away from economic espionage and hacking cases to 'research integrity' issues, such as failures to fully disclose foreign affiliations on forms.").

118. *See id.* (explaining that the MIT Technology Review searched through the 77 cases available from the China Initiative prosecutions).

119. *See id.* (cumulating the data of over 150 defendants and 77 cases charged under the China Initiative).

120. *Id.*

121. *See id.* (explaining that "23 of the 77 cases (30%) have involved questions of 'research integrity,'" which is simply failing intentionally or unintentionally to fully disclose all Chinese affiliations and sources of income in various forms).

122. *See id.* (explaining the pivot towards "research integrity" issues since the creation of the China Initiative).

123. *See id.*

A member survey of more than 3,200 physicists carried out in September by the American Physical Society found that more than 43% of foreign early-career researchers now consider the United States to be unwelcoming for international students and scholars . . . . Another survey of nearly 2,000 scientists at 83 research institutions carried out by the University of Arizona with the Committee of 100, an advocacy group that focuses on US-China issues, found that 51% of scientists of Chinese descent, including US citizens and noncitizens, feel

Due to the lack of a definition of what is considered a "China Initiative" case, it is hard to know the "exact number of scientists who have returned to China as a result of investigations or charges."[124] However, in late 2020, John Demers, the assistant attorney general of the National Security Division, said that "more than 1,000 PLA-affiliated[125] Chinese researchers left the country."[126] An additional group of 1,000 Chinese students and researchers had their visas revoked due to security concerns.[127] The security concerns have not been explained.[128] The MIT Technology Review Investigation reports:

> [The] China Initiative has strayed far from its initial mission. Instead of focusing on economic espionage and national security, the initiative now appears to be an umbrella term for cases with almost any connection to China, whether they involve state-sponsored hackers, smugglers, or increasingly, academics accused of failing to disclose all ties to China on grant-related forms. To date, only about a quarter of defendants charged under the initiative have been convicted, and only half of these defendants with open charges have yet to see the inside of an American courtroom.[129]

The statistics of those charged show a racially motivated targeting by the Department of Justice and Federal Bureau of Investigation.[130] Section 5712 of the National Defense Authorization Act[131] of 2020 attempted to hold the Department of

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considerable fear, anxiety, or both, about being surveilled by the US government. This compares to just 12% of non-Chinese scientists.

124. *Id.*

125. "PLA" stands for People's Liberation Army. Military service is mandatory for all Chinese citizens. *See* Palki Sharma, *Reasons Why China's People's Liberation Army is Not Invincible,* WION (Jun. 10, 2020) ("[M]ilitary service is mandatory for all Chinese citizens. The practice of conscription is held high even in the Chinese constitution.") [perma.cc/6S8M-55ED].

126. Guo, *supra* note 99.

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.* (combining the factors that the Department of Justice has no definition of what constitutes a China Initiative case, that the original goal was economic espionage but primarily targeted simple research integrity issues, and nearly 90% of the defendants charged are of Chinese heritage).

131. S.1790, 116th Cong. (2021).

Justice and Federal Bureau of Investigation accountable by requiring the Director of National Intelligence to produce a report regarding the protections of Chinese American civil rights when the agencies conduct counterintelligence operations against the Chinese government.[132] Despite the report being due in June of 2020, it still has not been produced at the time of researching this Note.[133]

Franklin Tao, one of the first victims of the China Initiative, was indicted for failing to disclose on a University of Kansas conflict-of-interest form that he had a relationship with Fuzhou University (FZU) in China.[134] The DOJ also indicted him for not disclosing this link to China while receiving federal funding from two U.S. agencies – the National Science Foundation and the Department of Energy.[135] Eight charges were brought against Dr. Tao.[136] Before Dr. Tao was indicted, he was a widely respected, incredibly productive, award-winning professor in the Chemical Engineering department at the University of Kansas.[137] He was a father to twin boys and husband to his wife, Hong Peng, who was excited about their recent move into their new home.[138] In late August, Dr. Tao was arrested in his home, his home and office were searched, and he was sent to the local jail.[139]

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132. *See* Michael German, *Why Ending the Justice Department's 'China Initiative' is Vital to U.S. Security*, BRENNAN CTR. FOR JUST. (Jan. 5, 2022) (explaining that the National Defense Authorization Act of 2020 required the Director of National intelligence to produce a report about the protections of Chinese American civil rights when they have been conducting counter-intelligence operations yet there has been no report despite it being due on June of 2020) [perma.cc/8W3F-QU23].

133. *See id.* (addressing the fact that the report was due 18 months prior to the writing of the article and the note still has not been produced).

134. Natasha Gilbert, *Convictions Reversed for US Chemical Engineer Accused of Hiding China Ties,* NATURE (Sept. 22, 2022) [perma.cc/PP76-KP3U].

135. *Id.*

136. *See id.* (listing the eight charges as six counts of wire fraud and two counts of making false statements).

137. Defendant Feng ("Franklin") Tao's Response to Government Sentencing Memorandum at 5, U.S. v. Feng Tao, 499 F.Supp. 3d 940 (D. Kan. 2020).

138. *See* Gideon Lewis-Kraus, *Have Chinese Spies Infiltrated American Campuses?*, NEW YORKER (Mar. 14, 2022) (describing Tao's family consisting of his twins and Peng's excitement of their new home with "modest, greenish four-bedroom with brick trim") [perma.cc/H7WC-RP39].

139. *Id.*

The next three and a half years, Dr. Tao would be on electronic monitoring and administrative leave without pay from the University of Kansas.[140] Dr. Tao's family would pay upwards of 1.9 million dollars in legal fees, and Hong was forced to work past the point of exhaustion to make ends meet.[141] Of the eight charges, the jury threw out four..[142] The jury found Tao guilty of three counts of wire fraud and one count of making a false statement.[143] Judge Robinson, however, overturned the wire-fraud convictions, finding that the DOJ's evidence was legally and factually insufficient.[144] This left Tao with one guilty charge for making a false statement.[145] The false statement was for failure to disclose his employment at FZU on KU's conflict-of-interest form, which has been coined as a notoriously hard form to decipher.[146] With a sentencing guideline suggesting 0–6 months, the Government pushed for a full 30 months in their sentencing report for a false statement.[147] Ultimately, Dr. Tao was released on time served on

140. *Id.*

141. *See Legal Defense Fund for Franklin Tao,* GOFUNDME (last updated Oct. 5, 2023) [perma.cc/689X-RN49].

> I [Franklin Tao's wife, Hong Peng] have been working for more than three jobs to sustain my family and pay for the legal bill[s]. We are now more than half a million in debt for our legal defense . . . [W]e have accumulated another $570,000 new legal fee[s] to be paid. We don't have any other sources of income.

142. Gilbert, *supra* note 134.

143. *Id.*

144. *Id.*

145. *See id.* ("[Judge Robinson] upheld the conviction stemming from Tao not disclosing his employment at FZU on KU's conflict-of-interest form.").

146. *See* Letter from Peter Dowben, Charles Bessey Professor of Physics to Judge Julie A. Robinson, Senior Federal District Judge for the Federal District Court of the District of Kansas (Dec. 15, 2022) (on file with author) (describing to Judge Robinson the "complexities and opaque nature of the university 'conflict of interest form'" in which most professors "find a morass of contradiction.").

147. *See* Ivan Moreno, *DOJ Wants 30 Months for Professor in 'China Initiative' Case,* LAW360 (Jan. 5, 2023) ("Federal prosecutors want a University of Kansas professor to spend 30 months in prison for concealing his connection to a Chinese university while receiving U.S. grants, saying it's important 'to deter other scientists who may be tempted to lie and cheat.'") [perma.cc/62UF-VNLQ].

January 19th, 2023, and this news served as a major blow to the China Initiative.[148]

An Ming Hu (胡安明), a victim of the China Initiative, was arrested in Tennessee, Knoxville, for three counts of fraud and three of making false statements.[149] An Ming Hu was a Chinese-Canadian who worked as an associate professor in the Department of Mechanical, Aerospace, and Biomedical Engineering at the University of Tennessee, Knoxville, for over seven years.[150] He was indicted for wire fraud and for making false statements about his affiliation with a Chinese university on research grant applications submitted to NASA.[151]

"That is the day I lost everything. I worked hard for years, and it happened in a few minutes." – An Ming Hu.[152]

An Ming spent the first 48 hours of his time in jail wondering how he even ended up in the cell in the first place.[153] He was first approached in April 2018 by FBI agents and a Department of Energy agent.[154] They asked him about international collaborations, specifically with China.[155] He told them everything because he felt that "[he] [didn't] have anything to hide. [He] didn't do anything wrong."[156] The conversation ended with the agents asking him to be a spy for the U.S. government.[157] He refused.[158]

148. Jeffery Mervis, *No Jail Time for Kansas Professor Convicted for Undisclosed Research Ties to China,* SCIENCE (Jan. 18, 2023) [perma.cc/K4AC-2V3G].

149. *See* Becca Wright, *Anming Hu Rebuilds Life, Career at the University of Tennessee After Beating False Charges*, KNOX NEWS (last updated Feb. 25, 2022) [perma.cc/T367-5T4T].

150. *Id.*

151. *See id.* (stating his charges of wire fraud and false statements in his application for a grant to NASA based on the omission of an affiliation he had with a Chinese University despite not being employed by that Chinese University).

152. Natasha Gilbert, *'I lost two years of my life': US scientist falsely accused of hiding ties to China speaking out*, NATURE (Mar. 7, 2022) [perma.cc/ZX5F-99AE].

153. Wright, *supra* note 149.

154. *Id.*

155. *See id.* ("They asked him about his international collaborations, specifically with China.").

156. *Id.*

157. *Id.*

158. *Id.*

This prompted the FBI to surveil him and his son for over a year, ultimately finding no evidence he was a Chinese spy.[159] Hu was arrested on six federal charges, three of fraud and three of making false statements, alleging that he distributed research funds to China or corporations owned by China while receiving a NASA-funded grant in 2016.[160] The Government claimed that Hu kept his summer job at Beijing University of Technology hidden from NASA.[161] However, during trial, evidence arose that Hu never hid his affiliations with Chinese institutions.[162] In fact, several emails and letters showed his willingness to inform the school about any contact with Chinese researchers or institutions.[163]

He was eventually released from jail and placed on house arrest for more than a year while awaiting trial, unable to step a foot past his front door.[164] A neighbor helped him take out the trash.[165] His church community helped him with groceries.[166] With his wife and two of his children in Canada, he was completely alone and "cr[ied] every night."[167] He was initially suspended from his job without pay and was later fired in October 2020 due to a failure to renew his work visa while he was awaiting trial.[168] His first trial resulted in a jury deadlock.[169] His second trial resulted in a full acquittal.[170] The Court found that the government had "failed to

159. *Id.*

160. *Id.*

161. *See id.* ("Federal prosecutors alleged Hu intentionally hid his summer job at Beijing University of Technology from NASA.").

162. *See* Gilbert, *supra* note 152 (outlining the university's "inconsistent advice about what links to China were allowed" and noting that Hu had "submitted a letter outlining his collaboration with the Beijing University of Technology").

163. *See id.* (same).

164. *See* Wright, *supra* note 149 ("Hu was released from jail and placed under house arrest. Unlike others bound to their homes by the pandemic, Hu wasn't even able to step out onto his front porch to get fresh air — his leg monitor would alert the authorities.").

165. *Id.*

166. *Id.*

167. Gilbert, *supra* note 152.

168. Wright, *supra* note 149.

169. *Id.*

170. United States v. Hu, No. 3:20-CR-21-TAV-DCP-1, 2021 WL 4130515, at *23 (E.D. Tenn. Sept. 9, 2021).

provide sufficient evidence."[171] After four months, his work visa application was approved, and he restarted at the University of Tennessee on February 1st, 2022, but his life has forever changed.[172] His research was set back by two years, and his lab was stripped of his research equipment that he used to conduct his studies with his students.[173] He feels justice has not been served, and he was a victim of racial profiling.[174]

Qing Wang (王擎), a 56-year-old U.S. citizen and medical researcher, was arrested in his home for allegedly failing to disclose his research in China.[175] Prior to this, he worked at the Cleveland Clinic for 21 years as a researcher whose pioneering work identified genes for heart arrhythmia that causes sudden death in young adults.[176] His charge was shortly listed on the Department's website, and he was fired from his job following an internal review that found he violated its policies.[177] The Department of Justice then removed his charge from the website and dropped the case when Qing produced a letter from his job allowing him written authorization to teach in China.[178] With no apology or reinstatement offer from the Clinic, he is now jobless.[179]

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171. *Id*. at *19.

172. Wright, *supra* note 149.

173. Gilbert, *supra* note 167.

174. *See id.* ("[Hu] doesn't want others to suffer in the same way he has . . . . Hu says he will be looking out for changes in the way researchers of Chinese descent are treated, and whether law-enforcement agencies, including the FBI, are held accountable for their actions.").

175. *See* Ellen Nakashima & David Nakamura, *China Initiative Aims to Stop Economic Espionage. is Targeting of Academics Over Grant Fraud 'Overkill'?*, WASH. POST (Sept 15, 2021) (noting that Qing immigrated to the United States after being born in rural China, and in 2005, became a citizen of his adopted country and he was arrested for allegedly neglecting to disclose to NIH that he was a beneficiary of the Thousand Talents Program, a Chinese government program) [perma.cc/3QFJ-XYWE].

176. *See id.* ("Over 34 years of research in the United States, including 21 at the Cleveland Clinic, Wang led a team that discovered the first gene for Brugada syndrome, a disorder causing irregular hearth rhythm, which can be fatal – especially in young people.").

177. *Id.*

178. *See id.* ("[Qing] disclosed to the Cleveland Clinic that he was affiliated with the talent program . . . .").

179. *See id.* ("The prestigious Cleveland Clinic, where he had worked for 21 years, fired him the same day . . . . [and] put 'additional safeguards into place' to help prevent similar problems.'").

He feels justice has not been served, and he was a victim of racial profiling.[180]

Other Chinese and Chinese American individuals have experienced the same injustice as An Ming Hu and Qing Wang..[181]

Haizhou Hu (胡海周).[182]

Lei Guan (关磊).[183]

Juan Tang (唐娟).[184]

Dr. Chen Song (宋琛).[185]

and many more Chinese people.[186]

These stories are homogenous in many ways. They were all Chinese. They were targeted. They were arrested and interrogated. Their lives were turned upside down. They were either completely innocent or had a significant number of charges dismissed. Chinese scientists and researchers across the country are fearful and uncertain of what their future could hold.[187] A mere

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180. *See* Prasso, *supra* note 5 (detailing Qing's zoom interview in which he stated he was a victim of the China Initiative and expressing that the Initiative is not fair and a byproduct of racial profiling).

181. *See* Wright, *supra* note 149 ("Of the 148 individuals charged, only 40 have pleaded or been found guilty . . . . Almost two-thirds of cases—64%—are still pending. And of the 95 individuals still facing charges, 71 are not being actively persecuted because the defendant is in an unknown location or cannot be extradited.").

182. *See "Black Eye" for the Department of Justice*, APA JUST. (explaining the prosecution dropping all charges against Haizhou after accusing him of stealing trade secrets from his professor) [perma.cc/9ZAC-DJMN].

183. *See* Don Lee, *Why Trump's Anti-Spy 'China Initiative' is Unraveling,* L.A. TIMES (Sept. 16, 2021) (describing that Lei Guan's charges of allegedly destroying evidence to obstruct an FBI investigation, visa fraud, and making false statements were all dropped due to a lack of evidence) [perma.cc/DW3B-U5RQ].

184. *See* Jane Lanhee Lee, *U.S. Moves to Drop Visa Fraud Charges Against Chinese Researcher,* REUTERS (Jul. 23, 2021) (stating that the DOJ dropped the charges alleging that Tang had allegedly concealed her military affiliation on her visa application) [perma.cc/CRX8-78MB].

185. *See Chen Song,* APA JUST. (reporting that the DOJ charged Dr. Song with visa fraud, obstruction of official proceedings, two counts of alteration, destruction, mutilation, concealment of records, and false statements only dismiss all counts) [perma.cc/8HP5-ZYSE].

186. *See* Guo, *supra* note 99 (compiling the results of more than 150 defendants across 77 cases showing results where the overwhelming amount of cases are pending or have fallen apart).

187. *See id.* (citing to surveys conducted of thousands of scientists in which more than 40-50% of foreign early-career researchers now consider the United States to be unwelcoming for international students, which is devastating

technicality on a form could result in a FBI investigation, years of legal trouble, and immeasurable harm to the reputations, careers, and livelihoods of Chinese scientists and researchers.[188] Professors have returned from these investigations fearful of applying for individual funding, and, instead, chose to apply for joint projects.[189]

This intentional targeting of Chinese scientists and researchers has created a feeling of fear that is widespread in the Chinese and Chinese-American academic community, and is antithetical to the purpose behind science – to build knowledge about the natural world to better humankind.[190] As Asian Americans Advancing Justice states best in an Amicus Brief for Franklin Tao's case: "Prosecution of Asian Americans simply for ties to China without evidence of economic espionage sets a dangerous precedent that threatens to repeat our history of scapegoating Asian Americans under the name of national security." [191]

The China Initiative raises the important question of whether the Government has the power to bypass the protections offered by the Fourteenth Amendment by claiming a threat to "national security" or foreign policy.

V. The Conflict Between the Levels of Scrutiny and the Equal Protection Doctrine

The levels of scrutiny are often more complicated than they seem, and the differences can make room for a severe violation of the Fourteenth and Fifth Amendment.

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because these students represent a "Critical component of [the United States] research workforce").

188. *See id.* ("In the meantime, the people caught up in the China Initiative have been left to deal with the damage done to their lives and careers—even if their cases were ultimately thrown out.").

189. *See* Gilbert, *supra* note 152 (noting that Anming Hu feels as if he needs to be "careful who he collaborates with and where he seeks funding from").

190. *See* Guo, supra note 99 (noting the massive amounts of deterrence the China Initiative caused in recruitment of international students, and the effect this has had on the scientific community in the United States).

191. Brief for Asian Americans Advancing Justice, as Amici Curiae Supporting Defendant at 37, United States v. Feng Tao, No. 19-20052-JAR, 2022 WL 252019 (D. Kan. Jan. 27, 2022).

A. *Levels of Scrutiny for Equal Protection Violations*

In 1868, three years after the end of the Civil War, the Fourteenth Amendment was passed to ensure the fair treatment of black individuals in former slave States.[192] The Fifth Amendment Due Process Clause guarantees that analysis applies similarly to the federal government.[193] To evaluate cases brought under the Fourteenth Amendment or the Fifth Amendment, the equal protection doctrine was created.[194] The justice-made doctrine is, on paper, relatively straightforward. In any alleged violation of the equal protection clause, the Court's first step is to determine which tier of scrutiny will apply: strict scrutiny, intermediate scrutiny, or rational basis.[195] The Court makes this decision based on the type of claim before them.[196]

A government action that infringes upon fundamental rights or differentiates individuals based on suspect classifications will be subject to strict scrutiny.[197] Suspect classifications are classifications based on race, alienage, or national origin.[198] Fundamental rights are rights such as marriage, privacy, contraception, interstate travel, procreation, and more.[199] In cases involving these remove restrictions, the burden is placed on the

192. *See Landmark Legislation: The Fourteenth Amendment,* U.S. SENATE ("[T]he Fourteenth Amendment granted citizenship to all persons 'born or naturalized in the United States,' including formerly enslaved people, and provided all citizens with 'equal protection under the laws,' extending the provisions of the Bill of Rights to the states.").

193. *See* Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

194. *See History of Equal Protection and the Levels of Review,* LAWSHELF (describing the "Warren Court" as the force for the creation of the levels of scrutiny) [perma.cc/VB8K-6JYH].

195. *See* Kristapor Vartanian, *Equal Protection*, 10 Geo. J. Gender & L. 227, 229–30 (2009) (explaining that the more rigorous the level of scrutiny, the more likely a state action is to be ruled unconstitutional).

196. *See id*. at 230–36 (describing the broad categories of claims as suspect classifications, fundamental rights, quasi-suspect classes, and claims that do not fall under any of these categories yet relate to equal protection).

197. *Id*. at 230.

198. *See id.* (clarifying that these classifications are the *only* classifications that the Supreme Court considers suspect).

199. *Id*. at 232–33.

government to demonstrate that the government action is "narrowly tailored to achieve a compelling government interest."[200] This level of scrutiny is the most rigorous of the standards and is the hardest for the government to survive.[201] Strict scrutiny is often summarized as "strict in theory, but fatal in fact."[202]

Classifications based on gender or legitimacy are classified as quasi-suspect classifications, and the Court will apply intermediate scrutiny.[203] Under immediate scrutiny, the government must show that the classification is *substantially related* to an important government interest.[204] For strict or intermediate scrutiny to apply, the government must have had intent to discriminate.

Finally, for all other classifications, such as age, disability, and more, the rational basis standard applies.[205] Under the rational basis standard, the government action must only be rationally related to a legitimate government purpose.[206] Rational basis is the most deferential standard, and the burden switches to the challenger to prove that the government action was not rationally related to a legitimate government purpose.[207] Courts rarely invalidate government action over rational basis review.[208]

While the levels of scrutiny seem to indicate a clear system of analyzing equal protection claims, the reality points to a muddled and unclear system.[209] For example, while strict scrutiny is applied

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200. *Id.*

201. *Id.*

202. *Id.*

203. *See id.* at 234 (explaining that intermediate scrutiny is also referred to as quasi-suspect or heightened scrutiny and is used to evaluate classifications that affect quasi-suspect classes).

204. *Id.*

205. *See id.* at 235 ("[Rational basis review] applies to all state classifications not affecting either a suspect or quasi-suspect class or impinging on a fundamental right.").

206. *Id.*

207. *Id.*

208. *See id.* (characterizing rational basis review as the most deferential standard).

209. *See* Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. PITT. L. REV. 1, 3 (2010).

for a government action that explicitly classifies individuals by race, national origin, or alienage, the analysis becomes much more complicated where the government action is facially neutral. In facially neutral government actions, whether the claim will be reviewed under strict scrutiny depends entirely on whether a Court finds that the state action resulted in a 1) racially discriminatory effect and 2) was motivated by a racially discriminatory purpose.[210] This analysis often produces incongruous results.[211] If the Court fails to find a racially discriminatory effect or racially discriminatory purpose, the rational basis test is then applied.[212] Furthermore, strict scrutiny is applied differently depending on the areas of equal protection law and can even be treated as disparate tests.[213]

Rational basis analysis is also imprecise. For example, a slightly stricter version of rational basis is coined by scholars as

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Cases such as *Romer v. Evans* and *Cleburne v. Cleburne Living Center* appear on their face to apply rational basis, but offer a significantly more stringent test than typical rational basis analysis. Heightened scrutiny was arguably revised by Justice Ginsburg in *United States v. Virginia*, to add the "exceedingly persuasive justification" language. The notion that strict scrutiny is strict in theory, but fatal in fact was addressed by Justice O'Connor in *Adarand v. Pena*, where she indicated that strict scrutiny did not necessarily need to be fatal. Consistent with this, Adam Winkler has conducted empirical research demonstrating that in its application in federal courts, strict scrutiny is in fact, not so fatal.

210. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

211. *See id.* at 1141.

When plaintiffs challenge facially neutral policies that have a disparate impact on minorities or women, the Court adopts a highly deferential stance towards a legislature's judgments. But when white plaintiffs challenge affirmative action policies that increase the institutional representation of minority groups, the Court has, with increasing insistence, warned that it will review and restrict the ambit of legislative action.

212. Vartanian, *supra* note 195, at 235.

213. *See* Gerstmann & Shortell, *supra* note 209, at 4 ("[S]trict scrutiny varies tremendously from subject area to subject area within equal protection jurisprudence . . . . Applying the same term to these disparate tests is misleading and prevents a clearer understanding of how courts treat equal protection claims.").

"rational basis with bite."[214] While rational basis with bite has never been formally recognized as a standard, a review of the precedents indicates that Courts are more likely to closely scrutinize the goals of a statute or the rationale for its implementation when immutability or significant rights are involved.[215]

The nuances to the levels of scrutiny are spotlighted in the outcomes and rationale of cases involving race or national origin.[216] Unclear standards of what satisfies a compelling governmental interest and what qualifies as "discriminatory purpose" leave room for implicit bias and human error in decisions that can be "gravely wrong."[217] The following cases highlight rationales in which cases have been able to evade strict scrutiny.

B. Cases in Our History that Demonstrate the Government's Ability to Evade Strict Scrutiny

1. Korematsu v. United States

On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, which authorized the Secretary of War and the armed forces to remove people of Japanese ancestry from their homes and into concentration camps.[218] 120,000 Japanese

214. *See* Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rationale Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072 (2015) (noting that the Supreme Court has never officially adopted rational bases with bite).

215. *Id.*

216. *See infra* Part V.III.B.

217. Trump v. Hawaii, 585 U.S. 667, 710 (2018); *see* Gerstmann & Shortell, *supra* note 209 (scrutinizing the fact that courts have not offered conclusive answers on what would satisfy compelling governmental interest).

218. Exec. Order No. 9066, 28 C.F.R. § 74.3 (1942).

> I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.

individuals were transported and relocated to government detention camps that were set up and occupied in about 14 weeks. Japanese ancestry was seen as a "dangerous element" and their loyalty was unable to be "determine[d]."[219] Specifically, "it ma[de] no difference whether [the Japanese individual] is an American citizen, he is still a Japanese."[220]

The President used the laws to his advantage by writing a vague order in which subsequent decisions of the military commanders could not be attributed back to him.[221] As the dissent states, it was a scheme designed so that nothing explicitly stated the decision was made based on "racial grounds."[222] Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui challenged the Executive Order separately in 1942, and in each instance, the Supreme Court upheld the military orders that imposed racial curfews, removal, and mass incarceration.[223] In *Korematsu*, the plaintiff remained in a "military area" even though his Japanese ancestry, under Executive 0rder 9066, would have prevented him from being there.[224]

Justice Black[225] wrote for the majority and started by recognizing the need to subject "legal restrictions which curtail the civil rights of a single racial group" to strict scrutiny.[226] Yet, he

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219. Korematsu v. United States, 323 U.S. 214, 236 n.2 (1944) (Murphy, J., dissenting).

220. *Id.*

221. *See Executive Order 9066: Resulting in Japanese-American Incarceration (1942),* NAT'L ARCHIVES ("Although the language of the order did not specify any ethnic group, Lieutenant General John L. DeWitt of the Western Defense Command proceeded to announce curfews that included only Japanese Americans.").

222. *Id.* at 6.

223. *See Korematsu*, 323 U.S. at 247–48 (categorizing the use of curfews as a war power rather than an infringement of deprivation of liberty).

224. *Id.* at 215.

225. Related to this opinion is the fact that Justice Black was a former Ku Klux Klan member prior to his role as Supreme Court Justice. *See* Thaddeus Morgan, *How an Ex-KKK Member Made His Way Onto the U.S. Supreme Court,* HISTORY (Oct. 10, 2018) ("Just a few weeks after getting confirmed, a report in the Pittsburgh Post-Gazette revealed Black's history with the Klan. The Pulitzer Prize-winning report by journalist Ray Sprigle featured Black's 1925 resignation letter from the Klan as proof.") [perma.cc/CX52-6FZ3].

226. Korematsu v. United States, 323 U.S. 214, 215 (1994).

stated that this law was well within the war power of Congress and the Executive, and disregarded the racial prejudice in this case.[227] Specifically, the justification of "espionage and sabotage" was a compelling enough government reason despite almost no evidence from the "war-making branches of the Government" as to the validity of the fear that Japanese individuals were "disloyal" and would engage in "espionage and sabotage."[228] Instead, Justice Black "deferentially accepted the government's claim that the racial group posed the 'gravest imminent danger to the public safety.'"[229]

The Court then paints the burden placed on Japanese individuals as a civic duty, and claims it is equal to their "burden of citizenship" – that when "under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[230]

While the Supreme Court and Congress has formally apologized for their decision in *Korematsu* and the impact on individuals of Japanese ancestry, the underlying rationale continued to apply in cases moving forward: the government can enact racially motivated policies and still survive the most rigorous standard of scrutiny under the guise of national security with complete deference by the courts. *Korematsu* has not been overruled.[231] The following case is a clear example of this rationale surviving once again.

2. Trump v. Hawaii

On January 27, 2017, Trump announced an executive order titled "Protecting the Nation from Foreign Terrorist Entry into the

227. *Id.* at 223 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue.").

228. *Id.* at 218.

229. Yamamoto & Oyama, *supra* note 75, at 693.

230. *Korematsu*, 323 U.S. at 220.

231. *See id.* 75, at 687 (highlighting that *Korematsu* is still significant and despite being mentioned negatively in *Trump v. Hawaii*, the case was not fully overturned, and in fact, part of its rationale was extended).

United States,"[232] or more commonly known as the "Muslim ban," in which the President banned travel from seven predominantly Muslim countries for ninety days, and suspended entry to the country of all Syrian refugees indefinitely, and prohibited any other refugees from coming into the country for 120 days.[233] The Countries targeted were Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[234] Congress already had a specific three-part solution to the same problem the President was allegedly solving: the issue of providing state sponsors of terrorism and countries that provide inaccurate information.[235] Further, the Order was drafted after the President called for a "total and complete shutdown of *Muslims* entering the United States," claiming that "Islam hates [the U.S.]", and that the United States was "having problems with Muslims coming into the country."[236] These statements indicated the President's intentions behind this policy: to implement a "Muslim ban" that he wanted "do[ne] legally."[237] The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for

232. Exec. Order No. 13769, 82 Fed. Reg. 8977 (2017).

233. *Id.* § 3.

234. *See* Trump v. Hawaii, 585 U.S. 667, 747 (2018) (Sotomayor, J., dissenting) ("Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation.").

235. *See id.* at 678.

The first, "identity-management information," focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U.S. Government's receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States.

236. *Id.* at 700 (emphasis added).

237. *See* Harsha Panduranga & Faiza Patel, *Extreme Vetting and the Muslim Ban*, BRENNAN CTR. FOR JUST. (Oct. 2, 2017) (citing that the President began to mention a complete shutdown of Muslims entering the United States on December 7, 2015) [perma.cc/9NST-TYNR].

the Ninth Circuit denied the Government's request to stay the order.[238] The basis for the Court's decision was that the States had a stronger likelihood of winning the due process and religious discrimination claim than the Government.[239]

In response, President Trump signed a second executive order, which attempted to replace the first and exempted individuals who already had visas and green cards and removed Iraq from the list of banned countries.[240] This time, a District Court judge in Hawaii and a federal court in Maryland blocked Trump's second ban before it took effect.[241] Through appeals, the case made its way up to the Supreme Court, but the second executive order expired before the "Court took any action, and [SCOTUS] vacated the lower court decision as moot."[242]

On September 24, 2017, the President issued Proclamation No. 9645:[243] "Enhancing Vetting Capabilities and Process for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats."[244] The Proclamation "placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate."[245] To determine which foreign states were selected for inclusion, a review was conducted by the Department of Homeland Security in conjunction with the State Department and several intelligence agencies.[246] The three-component review process led to the identification of sixteen countries as having deficient information-sharing practices and presenting national security concerns.[247] Countries were given a fifty-day period to improve their practices.[248] "Following the 50–

238. Washington v. Trump, 847 F.3d 1151, 1169 (9th Cir. 2017).

239. *See id.* at 1167–1168 ("[T]he Government has failed to establish that it will likely succeed on its due process argument in this appeal.").

240. Exec. Order No. 13780, 82 Fed. Reg. 13209 (2017).

241. Int'l Refugee Assistance Project v. Trump, 857 F.3d. 554 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017) (per curiam).

242. Trump v. Hawaii, 585 U.S. 667, 677 (2018).

243. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

244. *Trump*, 585 U.S. at 677.

245. *Id.*

246. *Id.* at 677–78.

247. *Id.*

248. *Id.* at 678.

day period, the Acting Secretary of Homeland Security concluded that eight countries— Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information."[249] Somalia met their review standards but was ultimately added anyways due to its "identity-management deficiencies" and "significant terrorist presence."[250] Yet, Iraq was removed from the list due to "close cooperative relationship between the U.S. and Iraqi Governments."[251]

The State of Hawaii, three individuals, and the Muslim Association of Hawaii filed suit against the Proclamation, except as applied to North Korea and Venezuela, for violating the Establishment Clause of the First Amendment.[252] The lawsuit, *Trump v. Hawaii*, took up the question of whether it was a violation of the establishment clause for a presidential proclamation to restrict foreign nationals of a majority of predominantly Muslim countries.[253]

The Supreme Court ruled that the Proclamation does not violate the Establishment Clause. In their rationale, the Court cites *Kleindienst v. Mandel*[254] to implement the rational basis test in this case.[255] *Mandel*, as Justice Kagan described it during the oral arguments, is equivalent to saying that "once the government comes forward with a legitimate reason – of course, national security is the most important reason one can come forward with – the game is over, essentially."[256] The Mandel test, essentially a rational basis review analysis, only requires the Court to determine "whether the Executive gave a 'facially legitimate and bona fide' reason for its action."[257] If the Executive can provide some sort of facially legitimate and bona fide reason, the courts

249. *Id.*
250. *Id.* at 678–79.
251. *Id.* at 679.
252. *Id.* at 2406.
253. *Id.* at 2400.
254. 408 U.S. 753 (1972).
255. Trump v. Hawaii, 585 U.S. 667, 703 (2018).
256. Transcript of Oral Argument at 13, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 17-965).
257. *Trump*, 585 U.S. at 703.

will "neither look behind the exercise of that discretion, nor test it by balancing its justification' against the asserted constitutional interests of U.S. Citizens."[258] Using this standard, the Court acknowledges that "it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny."[259] The Court ultimately ruled that the President has broad discretion to suspend the entry of non-citizens into the United States since it had a "legitimate purpose" of "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices."[260]

This unsettling rationale is similar in nature to the rationale in *Korematsu*: national security trumps the Constitution. In fact, President Trump's campaign surrogate "cited Japanese American incarceration as precedent for sweeping Muslim exclusionary measures, including the creation of a Muslim registry."[261] They claimed that the president could do this because entry by certain non-citizens would be detrimental to the interests of the United States.[262] The Proclamation was ruled to be constitutional.[263]

The dissent, as well as the oral arguments, produced questions that must be resolved.[264] Justice Kagan poses a hypothetical regarding the *Mandel* argument: whether the President should be allowed to have a racist attitude towards a group of individuals, approach his cabinet to make the exclusion of that group of individuals "legal," and surpass Constitutional restrictions based on the *Mandel* argument.[265] The Government's response in *Trump v. Hawaii* was simply that government officials are presumed to have good faith in the implementation of documents, but this categorically switches the burden to the plaintiff instead of placing the burden on the Government to prove their policies are in good

258. *Id.*

259. *Id.* at 705.

260. *Id.* at 706.

261. Yamamoto & Oyama, *supra* note 75, at 707.

262. *Id.*

263. Trump v. Hawaii, 585 U.S. 667, 710–11 (2018).

264. *Id.* at 721–54 (Breyer, J., dissenting) (Sotomayor, J., dissenting); Transcript of Oral Argument, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 17-965).

265. *See* Transcript of Oral Argument at 15–20, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 17-965)

faith.[266] When the Executive branch is given free rein to establish Executive Orders under a national security justification that is never verified or checked in any way, the consequences are devastating for the rights and freedoms of individuals.

VI. Solutions

A. *The Need to Rewrite Strict Scrutiny Analysis in Equal Protection Claims*

The government ought to be held to a *truly* strict standard of review for cases that allegedly violate the constitutional protections of individuals due to their race, national origin, or alienage. While the levels of scrutiny purport to establish these classifications under strict scrutiny, the government has evaded the Court's review or received complete deference to violations based on the government's ability to claim national security.[267] Even if the government fails to evade strict scrutiny, it can still pass the rigorous test on dubious claims of national security that will justify a compelling government interest with the current judicial deference the Court gives the government. This loophole has caused harm to Asians and Asian Americans for far too long, and these precedents make challenging anti-Asian government actions far too difficult for the plaintiffs.[268]

National security should not be used as a shield for the government to enact policies that classify individuals based on race, national origin, or alienage.[269] The Supreme Court should require the government to prove its national security risk based on concrete data, rather than to provide "unconditional deference" to

266. *See Trump*, 585 U.S. at 684 (describing 8 U.S.C. § 1182(f)'s high level of deference to the President in a decision to suspend entry of "any aliens or of any class of aliens").

267. *See supra* Part V.B.

268. *See supra* Part V.B. (highlighting legal decisions that upheld the harm); *supra* Part II.C. (analyzing the impacts of Japanese internment); *supra* Part IV.B (documenting the harms under the China Initiative).

269. *See* Yamamoto, *supra* note 75, at 689 ("In the ensuing decades, some courts and policy makers have relied on *Korematsu*, either explicitly or implicitly, as precedent for extreme judicial deference when reviewing sweeping restrictions of civil liberties justified in the name of national security.").

the government on all "national security" issues.[270] The national security façade currently, in effect, allows the government to evade strict scrutiny and eliminate its burden by claiming national security concerns for the China Initiative.[271] The era of blindly accepting the Executive's claim of national security ought to be over, and instead the court should require that the national security risk be well-founded and well-documented.[272] This prevents arbitrary claims of national security. Given the historical abuse behind the use of "national security" in civil rights litigation, the Court should automatically apply strict scrutiny in cases where the government claims national security against equal protection claims or constitutional violations.[273]

This would hold the government to a rigorous standard when claiming national security. It ensures the Courts consider the weight of the history behind the creation of the program. Presidential actions and public speeches should count as evidence of targeting. Legislation can be written to be facially neutral as a way to escape strict scrutiny, but if the author/designer of the government action has expressed their true intentions, the Court should consider these as evidence of discriminatory purpose. Finally, in conjunction with the other considerations, the outcomes of the government action should be weighed against the national security risks. The Government must be able to prove that discriminatory government action is the only way to move forward with ensuring national security protections for the country. This is not to say that the Government is not free to enact policies that are truly in the best interest of national security, but to ensure that these are not ill-founded government actions intended to racially

270. *See id.* at 691 (discussing the logic of *Korematsu* as being unconditional deference to the President when it comes to national security issues).

271. *See id.* at 690 ("Not only do courts allow the executive branch to enforce reasonable national security measures; some judges turn a blind eye to unfounded or even fabricated security claims, as the *Korematsu* Court did in 1944.").

272. *See id.* at 723 ("These cases and others collectively advance an imperative methodology for courts, especially in national security and civil liberties controversies that do not directly implicate a mix of immigration and foreign affairs: the express repudiation of *Korematsu's* "logic" of unconditional deference.").

273. *See id.* at 722 ("*Korematsu* continues to serve as a cautionary tale about enduring tears in the fabric of America's democracy when courts abdicate their role as a guardian of fundamental liberties.").

target minority groups, as the Government has Executive Order 9066, Proclamation No. 9465 and now, the continuation and broadened scope of economic espionage profiling on the heels of the China Initiative.

B. A Call to Action Against the China Initiative and the Government's Expanded Economic Espionage Program.

Civil rights advocacy groups should challenge the formally "ended" China Initiative and the government's continuation of investigations under the guise of economic espionage on equal protection grounds. The China Initiative and the continuation of "economic espionage" programs share its similarities with *Korematsu*'s fact pattern related to the intentional targeting of a minority group under the guise of national security suggest an opportunity to establish a test for analyzing national security in equal protections cases and to implement a truly strict standard of review. This shift would be the progress our judicial system should have made since the *Korematsu* decision, and it ensures that further harm like the one made in *Korematsu* will not occur. It is an opportunity for the Court to correct its former wrongs in full.

> The "core meaning of 'civil liberties' is freedom from coercive or otherwise intrusive governmental actions designed to secure the nation against real or, sometimes, imagined internal and external enemies." Judicial protection of these liberties aims to deter or halt 'actions [that] may get out of hand, creating a climate of fear, oppressing the innocent, stifling independent thought, and endangering democracy.[274]

Civil rights advocacy groups have already conducted the research behind the historical disparate impact of the Economic Espionage Act and the China Initiative.[275] Using this data, civil rights advocacy groups can easily combat the new, more expanded economic espionage act as a violation of the Fourteenth and Fifth Amendment as discrimination under national origin and race, both of which should be argued to be classified under a strict scrutiny

274. *Id.*

275. *See supra* Part IV.

analysis.[276] If the Court agrees with the analysis of strict scrutiny, there is an opportunity to discuss why the Government's claim of national security should follow a three part test before it is accepted as a compelling governmental interest. If the Court disagrees with the strict scrutiny analysis, it is an opportunity to advocate for an automatic application of strict scrutiny in cases where the government claims national security against equal protection claims or constitutional violations.

VII. Conclusion

The China Initiative was a discriminatory policy that has on its face, "ended," but has evolved in the Biden administration to be broader and "less targeted" towards one nation.[277] No matter the title of the program, the outcomes and effect of the economic espionage charges in the last fifteen years has greatly skewed towards prosecuting Chinese individuals.[278] The outcomes have been disastrous to the Chinese scientific community and Chinese and Chinese American individuals.[279] These economic espionage programs are a natural result of national security and economic scapegoating of Chinese individuals and is a harrowing reminder of the rationales America has used to justify violence and injustice against Asian individuals in this country.[280] Today, *Korematsu's* legacy is very much alive in our judicial rationales.[281]

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276. *See supra* Part V.A.

277. *See* Ryan Lucas, *The Justice Department is Ending its Controversial China Initiative,* NPR (Feb. 23, 2022) ("Olsen [head of the National Security Division and Assistant Attorney General] said he agrees with that assessment, and he vowed that the Justice Department will continue to combat Chinese espionage and cyberthreats, just without the China Initiative banner.") [perma.cc/CQD6-VT5W].

278. *See supra* Part IV.

279. *See supra* Part IV.B.

280. *See supra* Part V.B. (discussing the rationales of *Korematsu* and *Trump* that allowed constitutional violations to occur under the guise of national security).

281. *See* Yamamota & Oyama, *supra* note 75 ("Seventy-five years later, *Korematsu* remains startlingly significant, especially after the Supreme Court's 2018 ruling in *Trump v. Hawaii* that repudiated a key part of *Korematsu* (mass racial incarceration) while replicating another key part (extreme judicial deference).").

To end this cyclical targeting of Asian Americans, a national security test should be implemented to prevent abuse by the Government against equal protection violations and constitutional violations. Additionally, civil rights advocacy groups should challenge the constitutionality of the China Initiative and the subsequent expanded economic espionage program to overturn *Korematsu's* harmful legacy, effectively ending the abuse of our legal system to implement classification-based programs that disproportionately affect one minority group.