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“Vast Hordes . . . Crowding in Upon Us”: The Executive Branch’s Response to Mass Migration and the Legacy of *Chae Chan Ping*

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“VAST HORDES . . . CROWDING IN UPON US”:
THE EXECUTIVE BRANCH’S RESPONSE
TO MASS MIGRATION AND THE LEGACY
OF *CHAE CHAN PING*

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I. Introduction

We are here to assess the legacy of *Chae Chan Ping v. United States*,¹ a case once described as among “the most criticized cases in all of U.S. jurisprudence.”² It is considered one of the foundational cases of constitutional immigration law, having established a pronounced form of judicial deference to Congress and the Executive Branch known as the plenary power doctrine. Now that 125 years have passed, the *Chinese Exclusion Case* (as it is commonly called) has been cited in over 1700 law review articles and notes,³ and legal scholars have spilled rivers of ink parsing its meaning.⁴

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1. 130 U.S. 581 (1889).

2. Brief for Law Faculty as Amici Curiae Supporting Respondents at 5, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31455518, at *5.

3. A citation check via Westlaw’s “Citing References” indicates that, as of March 10, 2015, *Chae Chan Ping v. United States* has been cited in 1763 law review pieces (which would include articles, essays, and student notes). As we note later on, its doctrinal influence in reported cases has been much more limited. See *infra* note 15 and accompanying text.

4. See, e.g., Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015); David A. Martin,

Yet the impact of this Supreme Court decision echoes beyond formal legal doctrine. Our purpose in this essay is to consider how *Chae Chan Ping* influences the Executive Branch's policy response to mass migration, even today. The fear of mass migration reflected in the opinion, and the Court's articulation that our government must protect its citizenry from "vast hordes . . . crowding in upon us,"⁵ is a message that still resonates. When it comes to policy, the *Chinese Exclusion* case is more modern than one might expect. In fact, we see the fingerprints of *Chae Chan Ping* in the Obama Administration's current practice regarding the detention and processing of family migrants from Central America, and in the government's arguments defending this policy.

In Part II of this essay, we discuss how *Chae Chan Ping* was influenced by the fear of mass migration. Then, in Part III, we recount the modern iteration of *Chae Chan Ping* fears: the 2014 detention of migrant mothers with children in the remote town of Artesia, New Mexico. We criticize the government's process of screening these families for humanitarian relief and its insistence on detaining families even after they demonstrated a significant possibility of success in their claims.

II. *Chae Chan Ping and Fears of Mass Migration*

In *Chae Chan Ping v. United States*, the Supreme Court was set to decide the fate of a single individual: Chae Chan Ping. He was a Chinese migrant who had lived in the United States for twelve years and sought to

Why Immigration's Plenary Power Doctrine Endures, 68 OKLA. L. REV. 29 (2015); Michael Scaperlanda, *Scalia's Short Reply to 125 Years of Plenary Power*, 68 OKLA. L. REV. 119 (2015).

5. *Chae Chan Ping*, 130 U.S. at 606. Most of the scholarly analysis can be seen as an attempt to cabin the case's doctrinal influence. See, e.g., Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEORGETOWN IMMIGR. L.J. 257, 259-60 (2000) (expressing skepticism that there is a special rule of judicial deference for immigration law cases); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987) (asserting that the plenary power doctrine is a "constitutional fossil"); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, *passim* (1992) (identifying legal arguments to circumvent the application of the plenary power doctrine); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-54 (1990).

reenter the United States after a one-year visit to China.⁶ Chae Chan Ping had left the country with advance permission to return, but Congress revoked it while he was away.⁷

The opinion authored by Justice Stephen J. Field, however, did not focus on Chae Chan Ping the man. Instead, it was animated by concerns about Chinese migration in general and whether Congress had the authority to regulate Chinese migration *en masse*.⁸

Justice Field began by noting the concerns that West-Coast Americans had about Chinese migration years before Chae Chan Ping even left the United States. He wrote:

As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that *at no distant day that portion of our country would be overrun by them* unless prompt action was taken to restrict their immigration.⁹

Justice Field noted that California politicians, nearly ten years before Chae Chan Ping journeyed back to China, saw the problem of Chinese migrants in this light:

[T]he presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals; that their immigration was *in numbers approaching the character of an Oriental invasion*, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well-nigh universal; that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the State, without any interest in our country or its institutions.¹⁰

6. *Chae Chan Ping*, 130 U.S. at 582.

7. *Id.* at 582-83.

8. For analysis of the historical origin of “immigration as foreign aggression,” and the embodiment of this idea in *Chae Chan Ping* and its progeny, see Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 31-52 (2010).

9. *Chae Chan Ping*, 130 U.S. at 595 (emphasis added).

10. *Id.* at 595-96 (emphasis added).

It was these concerns, Justice Field pointed out, that led to the law requiring Chae Chan Ping to receive advance permission to return.¹¹ And it was a desire to prevent evasion of the underlying “policy of excluding Chinese laborers” that led to revocation of that same permission.¹²

Justice Field gave strong credence to the popular fears of being “overrun.” He wrote:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from *vast hordes of its people crowding in upon us*.¹³

Congressional determinations made to protect the nation’s security against these “vast hordes” would be, Justice Field determined, “conclusive upon the judiciary.”¹⁴

In some respects, the influence of *Chae Chan Ping* seems to be waning. Indeed, a quick glance at citation patterns suggests that while legal scholars talk a lot about *Chae Chan Ping*, the courts do not refer to it all that often.¹⁵

11. *Id.* at 596-99.

12. *Id.* at 599.

13. *Id.* at 606 (emphasis added). For more about Justice Field’s “xenophobic rhetoric” which reflected Justice Field’s “personal views of the Chinese,” see Victor C. Romero, *Elusive Equality: Reflections on Justice Field’s Opinions in Chae Chan Ping and Fong Yue Ting*, 68 OKLA. L. REV. 165 (2015).

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

15. *Chae Chan Ping* has been cited in 1763 law review pieces. *See supra* note 3. It has also been cited in 231 cases based on Westlaw’s Citing References. Westlaw’s Citing References includes a “depth of treatment” indicator for case citations. In 220 cases, *Chae Chan Ping* was cited with only a brief reference—either a string citation or less than a paragraph of discussion. In the 125 years since *Chae Chan Ping* was decided, in only three cases did it merit a depth of “4” in Westlaw’s Citing References, indicating an extended discussion of more than a printed page of text. Memorandum from Kate Irwin-Smiler, Reference Librarian, Wake Forest Univ. Sch. of Law on Citation Patterns for *Chae Chan Ping v. United States* to Margaret H. Taylor, Professor of Law, Wake Forest Univ. Sch. of Law (Mar. 10, 2015) (on file with authors). One of these cases, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), decided four years later, is considered *Chae Chan Ping*’s companion decision. *Fong Yue Ting* upheld an amendment to the Chinese Exclusion Act that called for the deportation of Chinese residing in the United States, thus extending the plenary power doctrine to deportation decisions. 149 U.S. at 725-32. Surprisingly, the two

Perhaps this is not surprising, given that the Supreme Court’s overtly racist pronouncements about Chinese immigrants are shocking to modern ears.¹⁶ When judges do cite to *Chae Chan Ping*, the citation is usually subsumed in a paragraph we might think of as a “plenary power incantation”—a recitation of rote, familiar phrases stating that judges owe significant deference to the political branches when it comes to decisions on whether to admit, exclude, or deport a noncitizen.¹⁷

Outside the world of reported cases, however, the fear of mass migration, identified and accepted by Justice Field in *Chae Chan Ping*, is the case’s policy legacy. After all, Justice Field charged that it was the federal government’s “highest duty,” subordinate to “nearly all other considerations,” to protect its people from mass migration.¹⁸ Policymakers have taken that call to duty seriously. Even today, our President speaks in terms of protecting Americans from a “wave” or “tide” or “surge” of unauthorized migration.¹⁹ The Administration talks about its duty to

other cases with an extended discussion of *Chae Chan Ping* do not center on the power to exclude or deport noncitizens and are not classical immigration decisions. *See* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685-86 (6th Cir. 2002) (upholding a First Amendment right to access to deportation proceedings, rejecting the government’s arguments that *Chae Chan Ping* and its progeny mandated plenary power deference in this context); *Gouveia v. Vokes*, 800 F. Supp. 241, 247-48 (E.D. Pa. 1992) (analyzing dicta in *Chae Chan Ping* about vested rights under treaties).

16. *See, e.g., Chae Chan Ping*, 130 U.S. at 595 (“[T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living.”).

17. *See, e.g., Hall v. INS*, 253 F. Supp. 2d 244, 248 (D.R.I. 2003) (“Removal of aliens and legal permanent residents (‘LPRs’) is a power inherent in every sovereign country. The authority of the United States Congress to regulate the admission of aliens to this country is plenary.”) (citation omitted).

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

19. *See, e.g., BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 263 (2006) (“[T]here’s no denying that many blacks share the same anxieties as many whites about *the wave of illegal immigration flooding our Southern border*—a sense that what’s happening now is fundamentally different from what has gone on before.”) (emphasis added); *see also* Press Release, The White House, Remarks by the President on Comprehensive Immigration Reform (July 1, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform> (“[T]his could lead to a *surge* in more illegal immigration.”) (emphasis added); Press Release, The White House, Remarks by the President on Comprehensive Immigration Reform (Jan. 29, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform> (“[W]e strengthened security at the borders so that we could finally *stem the tide of illegal*

“remain vigilant” and to “aggressively work to deter future increases and address the influx” of unauthorized migrants.²⁰

In the next section, we discuss the government’s most recent response to the fears of mass migration—the mass detention and rapid processing of Central American women traveling with children who seek humanitarian protection in the United States.

III. The Artesia Response to Mass Migration Fears

In the summer of 2014, American media was focused on a migration “surge” coming to the United States from Central America. Most of the attention was focused on unaccompanied children, who were traveling without an adult family member when Customs and Border Protection (CBP) officers apprehended them.²¹ More than 68,000 unaccompanied

immigrants.”) (emphasis added). Such rhetoric is not limited to the President. *See, e.g.*, Matthew Boyle, *Mo Brooks Demands Senate Vote to Block DACA: Illegal Immigration Surge Killing American Jobs*, BREITBART (Sept. 9, 2014), <http://www.breitbart.com/big-government/2014/09/09/mo-brooks-demands-senate-vote-to-block-daca-border-crisis-illegal-immigration-surge-killing-american-jobs/> (quoting Representative Brooks of Alabama as saying, “[W]e continue to have a huge *surge* of illegal aliens across our southern border”) (emphasis added); Jennifer Harper, *Mike McCaul Takes on Amnesty: ‘We Will See a Wave of Illegal Immigration’*, WASH. TIMES, Dec. 1, 2014, <http://www.washingtontimes.com/news/2014/dec/1/mike-mccaul-gets-rolling-amnesty-we-will-see-wave/> (quoting Texas Representative Mike McCaul as saying, “We will see a *wave* of illegal immigration because of the president’s actions, and in no way is the Department of Homeland Security prepared to handle such a *surge*.”) (emphasis added); *John McCain on Immigration*, ON THE ISSUES, http://www.ontheissues.org/celeb/john_mccain_immigration.htm (last visited June 30, 2015) (“I . . . have pledged that it would be among my highest priorities to secure our borders first, and only after we achieved widespread consensus that our borders are secure, would we address other aspects of the problem in a way that defends the rule of law and does not encourage another *wave* of illegal immigration.”) (emphasis added); Michael J. Mishak, *Sen. Rubio Takes Harder Line on Illegal Immigration*, PBS NEWSHOUR (Sept. 13, 2014, 1:25 PM EDT), <http://www.pbs.org/newshour/rundown/sen-rubio-stresses-tougher-border-security/> (“Congress, Rubio said, should first ‘make real progress on stemming the *tide* of illegal immigration.”) (emphasis added).

20. Gil Kerlikowsky, *Our Comprehensive Response at the Border, By the Numbers*, WHITE HOUSE BLOG (Sept. 15, 2014, 4:51 PM EDT), <http://www.whitehouse.gov/blog/2014/09/15/our-comprehensive-response-border-numbers>; *see also* Michael D. Shear & Ashley Parker, *Obama Presses Central American Leaders to Slow a Wave of Child Migrants*, N.Y. TIMES, July 25, 2014, at A14, *available at* http://www.nytimes.com/2014/07/26/us/politics/obama-migrant-children.html?_r=1 (quoting President Obama as saying, “[W]e have to deter a continuing *influx* of children”) (emphasis added).

21. An “unaccompanied alien child” is defined by statute as a child who

minors were apprehended by CBP between October 2013 and October 2014 after crossing the U.S.-Mexico border.²² That was almost double the number of child migrants who came during the same period the previous year.²³ Three-quarters of them came from Honduras, El Salvador, and Guatemala.²⁴

While arguments in each individual case are fact-specific, a very high percentage of children arriving from these countries could assert some claim for humanitarian protection, including asylum.²⁵ Under a specific statute enacted to protect victims of trafficking, unaccompanied children are generally released to a sponsor (often a family member already in the

-
- (A) has no lawful immigration status in the United States;
 - (B) has not attained 18 years of age; and
 - (C) with respect to whom –
 - (i) there is no parent or legal guardian in the United States; or
 - (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2) (2012). *See generally* LISA SEGHETTI ET AL., CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW (2014) [hereinafter CRS UNACCOMPANIED ALIEN CHILDREN REPORT], available at <http://fas.org/sgp/crs/homsec/R43599.pdf>; *Unaccompanied Alien Children (UAC)*, REFUGEE COUNCIL USA, <http://www.rcusa.org/uac> (last visited Apr. 13, 2015).

22. AM. IMMIGR. COUNCIL, CHILDREN IN DANGER: A GUIDE TO THE HUMANITARIAN CHALLENGE AT THE BORDER 1 (2014), available at http://www.immigrationpolicy.org/sites/default/files/docs/children_in_danger_a_guide_to_the_humanitarian_challenge_at_the_border_final.pdf; Haeyoun Park, Q. and A.: *Children at the Border*, N.Y. TIMES, Oct. 21, 2014, available at http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0.

23. P. J. Tobia, *No Country for Lost Kids*, PBS NEWSHOUR (June 20, 2014, 2:18 PM EDT), <http://www.pbs.org/newshour/updates/country-lost-kids/>.

24. Stephen Manning, *Ending Artesia*, INNOVATION L. LAB, <https://innovationlawlab.org/the-artesia-report/> (last visited June 30, 2015); *see also* CTR. FOR GENDER & REFUGEE STUDIES, CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES 46 (2015), available at http://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_FullBook_English.pdf.

25. A study conducted by the United Nations High Commissioner on Refugees (UNHCR), for example, concluded that 72% of the children from El Salvador, 57% from Honduras, and 38% from Guatemala merited some form of humanitarian protection. U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN 6 (2014), available at http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf; *see also* CTR. FOR GENDER & REFUGEE STUDIES, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM v-vi (2014), available at http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf.

United States)²⁶ and are placed in removal proceedings before an immigration judge, where they have the opportunity to present any claim that they are entitled to remain in the United States.²⁷

Although not as widely reported, there was a corresponding increase in families fleeing Central America during this time period.²⁸ In particular, Central American women were flocking to the United States with their children, fleeing threats and violence in their home countries.²⁹ As was true for children traveling alone, these family units also had strong claims to humanitarian protection under our laws.³⁰ But the statute that requires release from custody and a hearing before an immigration judge does not apply to mothers and children who are apprehended together. So the Executive Branch had more leeway to develop a policy response, and the Obama Administration decided to detain these families and use streamlined removal procedures known as expedited removal to send them back home.

Central American mothers with children who were apprehended by CBP were initially transferred to a makeshift family detention facility in the remote town of Artesia, New Mexico.³¹ The Artesia detention facility was created by repurposing a pre-existing Federal Law Enforcement Training Center, which sat on 1340 acres of land and had been used to train a variety of federal law enforcement agents—everyone from air marshals to CBP

26. In the absence of a sponsor, unaccompanied minors covered by these provisions can be sent to an appropriate shelter placement. *See generally* CRS UNACCOMPANIED ALIEN CHILDREN REPORT, *supra* note 21, at i.

27. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (the TVPRA), Pub. L. No. 110-457, 122 Stat. 5044. They are inapplicable to children arriving from Canada or Mexico. CRS UNACCOMPANIED ALIEN CHILDREN REPORT, *supra* note 21, at 4.

28. Manning, *supra* note 24.

29. *Id.*

30. *Id.* Fifteen mothers had merits hearings on their asylum claims while detained at Artesia (their minor children were derivatives on their mothers' applications). *Id.* These hearings were held via video teleconferencing with an immigration judge located elsewhere. *Id.* Migrants successfully asserted a right to relief in fourteen of those hearings. *Id.*

31. Julia Preston, *In Remote Detention Center, A Battle on Fast Deportations*, N.Y. TIMES, Sept. 5, 2014; *see also* DETENTION WATCH NETWORK, EXPOSE AND CLOSE: ARTESIA FAMILY RESIDENTIAL CENTER, NEW MEXICO 1-3 (2014) [hereinafter EXPOSE AND CLOSE REPORT], available at http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose_close_-_artesia_family_residential_center_nm_2014.pdf. Artesia is a small oil town in southeastern New Mexico, at least 200 miles from any major city. EXPOSE AND CLOSE REPORT, *supra*, at 3.

officers.³² The detention facility opened on June 27, 2014, and had the capacity to hold 700 migrants.³³

In this essay, we critique two aspects of the Administration’s policy at Artesia. First, the government used the expedited removal process—already the subject of extensive criticism when employed at ports of entry—on a large population of asylum-seekers apprehended after having entered the United States.³⁴ This effort to quickly deport Central American families—still ongoing in newly opened facilities—raises an important question about the scope of the plenary power doctrine. Second, the practice of detention without bond at Artesia, which government officials justified as necessary to deter mass migration, is a form of “symbolic detention” that does not comport with procedural due process.³⁵

A. Expedited Removal at Artesia

Congress created expedited removal procedures in 1996 as a means to prevent would-be migrants who arrive without proper documents from entering the country.³⁶ The expedited removal process permits a CBP officer to enter a final removal order without a hearing, as explained below.

Initially, expedited removal applied only to people who presented themselves for inspection at ports of entry.³⁷ In 2004, the Department of

32. *About the Artesia Center*, FED. L. ENFORCEMENT TRAINING CTRS., <https://www.fletc.gov/about-artesia-center> (last visited June 30, 2015).

33. Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES, Dec. 16, 2014, at A18, available at http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html?ref=us&_r=2. By July 24, Artesia held between 400 and 500 women with children. Manning, *supra* note 24.

34. Manning, *supra* note 24.

35. Professor Taylor has previously criticized the “use of detention to send a message, in the hopes of deterring certain conduct or building confidence in [immigration] enforcement efforts,” which she termed “the symbolic component of immigration detention.” Margaret H. Taylor, *Symbolic Detention*, in 20 IN DEFENSE OF THE ALIEN 153, 155 (Lydio F. Tomasi ed., 1997) [hereinafter Taylor, *Symbolic Detention*]. See generally Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149 (2004) [hereinafter Taylor, *Dangerous by Decree*]. Professor Johnson draws on her experiences as a volunteer pro bono attorney representing Artesia detainees. See *infra* notes 56-57, 71.

36. 8 U.S.C. § 1225(b)(1)(A)(i) (2012); RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 40-41 (3d ed. 2012).

37. See, e.g., Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedures*, 11 GEO. IMMIGR. L. J. 267, 279-82 (1997); see also Allen Keller et al., *Study on Asylum Seekers in Expedited Removal: Evaluation of Credible Fear Referral*

Homeland Security exercised discretion granted by statute to employ expedited removal procedures when processing individuals who entered without inspection and were apprehended within 100 miles of the border, unless they could show that they had been continuously present in the United States for more than fourteen days.³⁸

As originally conceived in the implementing regulations, expedited removal procedures were designed to be protective of anyone who asked for asylum or expressed a fear of returning to their home country.³⁹ Here is how expedited removal is supposed to work: A CBP officer inspects the applicant for admissibility—essentially, permission to enter the United States.⁴⁰ If the officer believes the migrant might be subject to expedited removal because of misrepresentation or lack of documents, she is sent to secondary inspection for a more extensive interview.⁴¹ At this stage, the applicant for admission is specifically advised to inform the officer if she might face persecution, harm, or torture upon return to her home country, or if she has any fear or concern about being removed.⁴² Upon any mention of

in Expedited Removal at Ports of Entry in the United States, in U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME II: EXPERT REPORTS 1, 4 (2005) [hereinafter Keller et al., *Study on Asylum Seekers in Expedited Removal*], available at http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/ERS_RptVolII.pdf.

38. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).

39. David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 681-82 (2000) [hereinafter Martin, *Two Cheers for Expedited Removal*].

40. 8 U.S.C. § 1225(a).

41. *Id.* § 1225(b); see also THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 569-80 (2012). Expedited removal is triggered when an applicant for admission is judged inadmissible under 8 U.S.C. § 1182(a)(6)(C) (relating to fraud and misrepresentation) and 8 U.S.C. § 1182(a)(7) (relating to lack of passport, visa, or other required document). 8 U.S.C. § 1225(b)(1)(A)(i).

42. 8 U.S.C. § 1225(b)(1)(A)(ii). In every expedited removal case, the CBP offer must take a sworn statement on Form I-867 AB. 8 C.F.R. § 235.3(b)(2)(i) (2014). The form includes the advisal:

U.S. law provides protection to certain persons who face persecution, harm, or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me during this interview because you may not have another chance.

THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES: SELECTED STATUTES, REGULATIONS AND FORMS 1024 (2014). The officer then records answers to specific questions, including, "Do you have any fear or concern about being returned to your home country or being removed from the United States?" and

such fear, the applicant must be referred for a credible fear interview by a specially trained asylum officer.⁴³ In the absence of any stated fear, a supervisory CBP officer will sign off on the removal order, which then becomes final without any hearing.⁴⁴

When the government implements expedited removal at ports of entry, relatively few individuals who present themselves for admission articulate any fear of return during secondary inspection.⁴⁵ Those who do are detained,⁴⁶ and are generally given a few days so that they might contact family members, seek legal counsel, and prepare for their credible fear interview.⁴⁷ By statute, “credible fear” is a low-threshold standard; the applicant must show “a significant possibility, taking into account the credibility of the statements . . . and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”⁴⁸ The interviews conducted by asylum officers are supposed to be careful and extensive.⁴⁹ Under the statute and governing regulations, when an asylum officer believes there is a potential argument that an applicant for admission has an asylum claim, the officer refers the case to a full-blown hearing

“Would you be harmed if you are returned to your home country or country of last residence?” *Id.* Family members, attorneys, and other observers are not permitted to be present when an individual is interviewed by CBP at secondary inspection. Karen Musalo, *Expedited Removal*, HUM. RTS., Winter 2001, at 12, 13 (vol. 28, no. 1). When observers have been allowed, studies suggest that CBP officers do not always comply with these required procedures. Keller et al., *Study on Asylum Seekers in Expedited Removal*, *supra* note 37, at 41-43 (concluding that in approximately half of secondary inspections observed, inspectors failed to read all of the standard script, and in 15% of observed cases an individual who expressed a fear of return was not referred to a credible fear interview).

43. 8 C.F.R. § 235.3(b)(4).

44. 8 U.S.C. § 1225(b)(1)(B)(iii); *see also* BOSWELL, *supra* note 36, at 41.

45. ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 9 (2005) (noting that at ports of entry, 3% of applicants for admission who were subject to expedited removal were referred to a credible fear interview in fiscal year 2003); *see also* Martin, *Two Cheers for Expedited Removal*, *supra* note 39, at 680 (stating that at a time when expedited removal was implemented only at ports of entry, the overwhelming majority of expedited removal orders arose in cases where asylum is not at issue, and there is no credible fear screening).

46. 8 C.F.R. § 235.3(b)(4)(ii).

47. ALEINIKOFF ET AL., *supra* note 41, at 577-78. The statute and regulations provide that an individual subject to a credible fear interview has a right to consult with a person of his choosing prior to the interview; and to have such person present at the interview. 8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. § 208.30(d)(4).

48. 8 U.S.C. § 1225(b)(1)(B)(v).

49. Martin, *Two Cheers for Expedited Removal*, *supra* note 39, at 683.

before an immigration judge.⁵⁰ Individuals who do not pass their asylum office credible fear interview are removed promptly without further hearing,⁵¹ unless they request review of the negative credible fear finding by an immigration judge.⁵²

Critics of expedited removal contend that CBP officers do not follow proper screening procedures during secondary inspections.⁵³ Nevertheless, historically, the success rate at credible fear interviews is quite high.⁵⁴ Nationwide, approximately 77% of individuals subject to credible fear screening met that standard between October 2013 and June 2014.⁵⁵

For women and children detained at Artesia, the expedited removal process was dramatically different. The vast majority did not present themselves at ports of entry. Rather, they surreptitiously entered the country⁵⁶ and either turned themselves over to or were found by CBP

50. *Id.* at 679-80.

51. 8 U.S.C. § 1225(b)(1)(B)(iii)(I).

52. *Id.* § 1225(b)(1)(B)(iii)(III).

53. See Keller et al., *Study on Asylum Seekers in Expedited Removal*, *supra* note 37, at 26-27; Musalo, *supra* note 42; Schrag & Pistone, *supra* note 37, at 282.

54. Data across the years of implementing expedited removal at ports of entry consistently shows that at least three-quarters of individuals interviewed by asylum officers are found to have a credible fear of persecution and thus are able to pursue their asylum claim before an immigration judge. GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: CHANGES IN THE PROCESS OF DENYING ALIENS ENTRY INTO THE UNITED STATES 5 (1998), available at <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GGD-98-81/pdf/GAOREPORTS-GGD-98-81.pdf>; GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: OPPORTUNITIES EXIST TO IMPROVE THE EXPEDITED REMOVAL PROCESS 47 (2000), available at <http://www.gao.gov/archive/2000/gg00176.pdf>; Siskin & Wasem, *supra* note 45, at 8-9. At some points in time, and in some jurisdictions, over 90% of individuals pass their asylum office credible fear interview. See GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: CHANGES IN THE PROCESS, *supra*, at 5 (79% passed credible fear interview); GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: OPPORTUNITIES EXIST TO IMPROVE, *supra*, at 47 (calculating that as of November, 1999, 96% of applicants for admission who were referred for credible fear interviews were determined to have credible fear); Siskin & Wasem, *supra* note 45, at 8-9 (noting that from fiscal year 2000-2003, 93% of those referred for a credible fear determination were approved).

55. U.S. CITIZENSHIP AND IMMIGRATION SERVS., CREDIBLE FEAR WORKLOAD REPORT SUMMARY FY 2014 (2014), available at http://www.uscis.gov/sites/default/files/USCIS/Outreach/Credible_Fear_and_Reasonable_Fear_FY14_Q3.pdf.

56. Nearly all of the women that Professor Johnson interviewed at Artesia had crossed the Rio Grande at the border of McAllen and Reynosa. Some rode rafts. Some swam while pushing their children on rafts. Others carried their children on their shoulders while walking across the river.

agents within 100 miles of the U.S.-Mexico border.⁵⁷ Under the 2004 regulations noted above, they were subject to detention and expedited removal.

To our knowledge, this was only the second time that large-scale detention and expedited removal procedures were deployed together against asylum applicants apprehended *after* entering the United States in a mass migration context.⁵⁸ In response to a public outcry over the “startling number” of migrants arriving in 2014,⁵⁹ Obama Administration officials

57. Some of the women Professor Johnson interviewed at Artesia actively sought out CBP agents after crossing the river. Others did not.

58. Historically, the United States has used detention as a tactic to deter mass migration of asylum-seekers from Haiti and Central America, and prejudged asylum claims prior to individual hearings. See Robert E. Koulish, *Systemic Deterrence Against Prospective Asylum Seekers: A Study of the South Texas Immigration District*, 19 NYU REV. L. & SOC. CHANGE 529, 533 (1992); see also *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 566-67 (9th Cir. 1990) (upholding permanent injunction and ordering Immigration and Naturalization Service (INS) to provide Salvadoran detainees notice of their rights to political asylum and access to counsel); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1031 (5th Cir. 1982) (holding that the INS effectively denied Haitian detainees their right to petition for asylum by instructing immigration judges to hold fifty-five hearings a day rather than one, shortening asylum interviews from an hour and a half to fifteen minutes, and giving immigration attorneys impossible schedules); *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799-800 (N.D. Cal. 1991) (settlement decree in class action regarding biased adjudication of Guatemalan and Salvadoran asylum applications, including requiring reconsideration of approximately 250,000 applications); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504 (C.D. Cal. 1988) (holding that INS was permanently enjoined from forcing Salvadoran detainees to sign voluntary departure agreements and subjecting them to other abusive practices). These efforts involved procedural short cuts and truncated hearings that undermined asylum seekers’ right to proceed before an immigration judge, which were enjoined by a court or subject to a consent decree. But they were ad hoc and extra-statutory policies that preceded the enactment of expedited removal in 1996. More recently, no-bond detention and expedited removal procedures were used against Haitian asylum seekers who were apprehended ashore after their vessel attempted to evade Coast Guard interdiction. *In re D-J-*, 23 I & N Dec. 572, 572-73 (A.G. 2003). The policy announced in *In re D-J-* applied to 216 migrants who ran ashore and were apprehended on a particular date, and to “similarly situated undocumented . . . seagoing migrants.” *Id.* at 579. The decision in *In re D-J-* is discussed in the next section. See *infra* Part III.B.

59. Press Release, White House, Remarks to the Press with Q & A by Vice President Joe Biden in Guatemala (June 20, 2014) [hereinafter Press Release, Remarks by Vice President Joe Biden], available at <https://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala>; see also Halimah Abdullah, *Not in My Backyard: Communities Protest Surge of Immigrant Kids*, CNN (July 16, 2014, 9:46 AM ET), available at <http://www.cnn.com/2014/07/15/politics/immigration-not-in-my-backyard>.

decided to disable the protective function of credible fear screening, and instead to use expedited removal to facilitate the rapid, mass deportation of the women and children from Central America in an effort to halt future migration flows.⁶⁰

President Obama himself announced that detention and expedited removal of Central American families was part of an “aggressive deterrence strategy”⁶¹ employed to send a message that (in the words of the Secretary of Homeland Security) “we will send you back.”⁶² Before credible fear screening had even started at Artesia, Vice President Biden stated at a press conference that “*none* of these children or women bringing children will be eligible” to remain in the United States.⁶³ This message filtered down to asylum officers conducting credible fear interviews at Artesia and to the immigration judges who conducted video hearings to review negative findings. During the first seven weeks that the Artesia facility was in operation, the credible fear approval rate for Artesia families was just 37.8%—less than half the nationwide figure.⁶⁴

During this period, mothers who had already suffered significant trauma in their journey to the United States faced nearly insurmountable obstacles in navigating the expedited removal process due to the circumstances of their detention.⁶⁵ They were called into credible fear interviews and video hearings with no advance notice, children in tow.⁶⁶ Mothers were asked to recount the story of why they came to the United States, not knowing the

60. See Juan Carlos Llorca, *Fed Says They Will Expedite Deportations to 10-15 Days at N.M. Facility*, SEATTLE TIMES, June 27, 2014, <http://www.seattletimes.com/nation-world/fed-says-they-will-expedite-deportations-to-10-15-days-at-nm-facility/> (“[A] senior U.S. Immigration and Customs Enforcement (ICE) official said the goal is to process the immigrants and have them deported within 10 to 15 days to send a message back to their home countries that there are consequences for illegal immigration.”).

61. Letter from the President, Barack Obama, to Congress, on Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border (June 30, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>.

62. Press Release, Jeh Johnson, Sec. of Homeland Security, Statement Before the Senate Committee on Appropriations (July 10, 2014), available at <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>.

63. Press Release, Remarks by Vice President Joe Biden, *supra* note 59 (emphasis added).

64. Complaint at 31, *M.S.P.C. v. Johnson*, No. 1:14-cv-01437 (D.D.C. Aug. 22, 2014), available at <https://www.aclu.org/immigrants-rights/mspc-v-johnson-complaint>.

65. *Id.* at 23-28.

66. *Id.*

legal significance of key facts.⁶⁷ To the extent they understood the import of the questions being asked, they were then faced with a difficult choice of whether or not to recount details of horrific events—including death threats, rape, and severe domestic violence—in the presence of their children.⁶⁸ By mid-August, the government deported nearly 300 women and children from family detention,⁶⁹ reflecting the promise of an unnamed government official that “the goal” of Artesia was to “have them deported within 10 to 15 days.”⁷⁰

What changed the outcomes at Artesia was a massive mobilization of pro bono attorneys to challenge the machinery of deportation erected there. Volunteers at Artesia worked in teams to represent detained mothers and children—seeking new credible fear interviews to prevent imminent removals, petitioning for release of families on bond, and representing applicants at merits hearings.⁷¹ Despite formidable obstacles,⁷² the Artesia

67. *Id.*

68. Numerous sources recount the stories of women and children detained at Artesia, uniformly confirming these details. For media reports, see John Burnett, *Immigrant Advocates Challenge the Way Mothers Are Detained*, NPR, Oct. 15, 2014, <http://www.npr.org/2014/10/15/356419939/immigrant-advocates-challenge-way-mothers-are-detained>; Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES, Feb. 4, 2015, <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention>. Stephen Manning, an attorney who played a central role coordinating a pro bono campaign at Artesia, has provided a comprehensive and compelling interactive report. Manning, *supra* note 24. These facts also emerged in legal challenges to the implementation of expedited removal at Artesia. Complaint, *supra* note 64, at 3-5; see also Daniel M. Kowalski, D.N.M. on Habeas, Court-Stripping, Suspension Claus, Expedited Removal, Artesia: M.S.P.C. v. CBP (Oct. 23, 2014), <http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2014/10/23/d-n-m-on-habeas-court-stripping-suspension-claus-expedited-removal-artesia-m-s-p-c-v-cbp.aspx>. A resource page for the *M.S.P.C. v. Johnson* lawsuit collects declarations from lawyers with first-hand experience representing Artesia detainees, which together “paint a bleak picture of the lack of due process that the women and children are facing.” *M.S.P.C. v. Johnson-Declarations*, ACLU, <https://www.aclu.org/immigrants-rights/mspc-v-johnson-declarations> (last visited June 15, 2015).

69. Cindy Carcamo, *Nearly 300 Women, Children Deported from Immigration Detention Centers*, L.A. TIMES (Aug. 21, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-ff-new-mexico-immigration-deportation-20140821-story.html>.

70. Llorca, *supra* note 60.

71. Hylton, *supra* note 68; see also Kit Johnson, *Live from Artesia: Day One*, IMMIGRATIONPROFBLOG (Nov. 30, 2014), <http://lawprofessors.typepad.com/immigration/2014/11/live-from-artesia-day-one.html>; Kit Johnson, *Live from Artesia: Day Two, Morning Edition*, IMMIGRATIONPROFBLOG (Dec. 1, 2014), <http://lawprofessors.typepad.com/immigration/2014/12/live-from-artesia-day-two.html>; Kit Johnson, *Live from Artesia: Afternoon Edition*,

project had considerable impact. By October 2014, the success rate for credible fear screenings at Artesia normalized to match the national rate.⁷³ And contrary to the Vice President's public pronouncement that "none" of the women and children fleeing Central America would be able to remain in the United States, the Artesia project won fourteen out of the fifteen asylum cases tried on the merits.⁷⁴

Nationwide, additional volunteers worked remotely to represent detainees in merits case and to build protocols to assist attorneys at Artesia with the very high volume of credible fear interviews and bond hearings.⁷⁵ And advocacy organizations filed an individual and a class action lawsuit challenging the "due process black hole[]"⁷⁶ of Artesia.⁷⁷ Ultimately, the

IMMIGRATIONPROFBLOG (Dec. 1, 2014), <http://lawprofessors.typepad.com/immigration/2014/12/live-from-artesia-day-two-afternoon-edition.html>; Kit Johnson, *Live from Artesia: Day Three, Morning Edition*, IMMIGRATIONPROFBLOG (Dec. 2, 2014), <http://lawprofessors.typepad.com/immigration/2014/12/my-entry.html>; Kit Johnson, *Live from Artesia: Day Four, "Everyone Cries in Artesia"*, IMMIGRATIONPROFBLOG (Dec. 3, 2014), <http://lawprofessors.typepad.com/immigration/2014/12/live-from-artesia-day-four-everyone-cries-in-artesia.html>; Kit Johnson, *Live from Artesia: Day Five - Laughter Amid Tears*, IMMIGRATIONPROFBLOG (Dec. 4, 2014), <http://lawprofessors.typepad.com/immigration/2014/12/live-from-artesia-day-five-laughter-amid-tears.html>; Kit Johnson, *Live from Artesia: Day Six - The Last Hearings*, IMMIGRATIONPROFBLOG (Dec. 5, 2014), <http://lawprofessors.typepad.com/immigration/2014/12/live-from-artesia-day-six-the-last-hearings.html>.

72. When volunteer attorneys arrived at Artesia, there was no infrastructure in place to build a pro bono representation project. Manning, *supra* note 24; *see also* Hylton, *supra* note 68. Detainees had to smuggle their names on pieces of paper passed surreptitiously to attorneys in order to be put on "the list" to be able to meet with an attorney. Manning, *supra* note 24; *see also* Hylton, *supra* note 68. The lawyers often did not know in advance which individuals would be called suddenly in for a credible fear interview or bond hearing. Manning, *supra* note 24; *see also* Hylton, *supra* note 68.

73. USCIS ASYLUM DIV., ARTESIA, KARNES, NATIONAL STATS (2014), *available at* http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_Artesia_and_Karnes_Updates_Through_October_2014.pdf. These figures from July to October 2014 do indicate, however, that nationwide the success rate in credible fear interviews had dropped from the usual rate of roughly 75% to 61%. *Id.*

74. Manning, *supra* note 24. The single case lost has been appealed. *Id.*

75. *Id.*

76. *Id.*

77. Two lawsuits, both with the same named plaintiff (known by her initials, M.S.P.C.), challenged the implementation of expedited removal at Artesia. *See* M.S.P.C. v. U.S. Customs & Border Patrol, No. 14-769 JCH/CG, 2014 WL 6476125 (D. N.M. Oct. 16, 2014); Complaint, *supra* note 64. M.S.P.C., filed in district court in New Mexico, was a habeas corpus action seeking to overturn an individual expedited removal order, which the petitioner contended was substantively incorrect and procedurally invalid. M.S.P.C., 2014

federal lawsuits raising constitutional challenges to credible fear screening at Artesia did not come to fruition.⁷⁸ But in contesting these actions, government attorneys asserted a novel legal argument: that when expedited removal procedures were extended by regulation in 2004 to individuals who are apprehended after surreptitious entry into the United States, this trumped over a century of Supreme Court precedent affirming the procedural due process rights of noncitizens who enter without inspection. In the next section, we consider that argument as it arose in challenges to the government’s refusal to release Central American families from detention once they passed their credible fear interviews.

B. The No-Bond/High-Bond Policies

The initial detention of women with children at Artesia and the use of expedited removal procedures were not the only striking features of the government’s response to the 2014 migration “influx.” Perhaps more surprising was the fight by government attorneys to *continue* detaining those women with children who did manage to obtain an initial credible fear finding while they awaited a hearing on the merits of their claims for humanitarian relief before an immigration judge.

Individuals who pass a credible fear screening may be released on bond.⁷⁹ The process happens in two stages. First, an Immigration and

WL 6476125, at *1. The district court concluded in an unreported opinion that it did not have jurisdiction to hear the challenge. *Id.* at *7. While this argument was not necessary to reach the jurisdictional question, the government asserted and the district court concluded in dicta that the petitioner, who had been apprehended nine miles from the border and within thirty minutes of crossing, should have her status assimilated to that of an arriving alien and thus “has no constitutional due process rights.” *See id.* at *16-17; *see also infra* Part III.B. A second lawsuit, *M.S.P.C. v. Johnson*, was a class action filed in District Court in the District of Columbia challenging the policies and practices of implementing expedited removal at Artesia. Complaint, *supra* note 62.

78. In the individual *M.S.P.C.* action, the initial expedited removal order (which was unsuccessfully challenged in court) was not executed. Email from Daniel Thomann to Margaret Taylor (Feb. 24, 2015) (on file with author). Instead, petitioner’s pro bono attorney secured a second credible fear interview while she was detained at Artesia. *Id.* The second asylum officer concluded that M.S.P.C. did have a credible fear, reversed the initial denial, and M.S.P.C. (along with her year-old son) ultimately bonded out of detention. *Id.* As this article goes to press, she is represented by pro bono counsel and awaiting a hearing on her asylum claim. *Id.* The M.S.P.C. class-action complaint was voluntarily dismissed. *M.S.P.C. v. Johnson*, ACLU (Jan. 30, 2015), <https://www.aclu.org/cases/mspc-v-johnson?redirect=immigrants-rights/mspc-v-johnson>.

79. *See* 8 U.S.C. § 1226(a)(2)(A), (a)(2)(B) (2012).

Customs Enforcement (ICE) officer makes an initial custody determination.⁸⁰ The governing regulations specify that “the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceedings.”⁸¹ If ICE denies release or sets bond the applicant cannot pay, she is entitled to seek a custody redetermination before an immigration judge, who has jurisdiction over bond motions for respondents in removal proceedings.⁸²

As was true with credible fear screening, initial bond determinations and bond hearings before immigration judges operated very differently at Artesia than in other detention settings. ICE officers flatly refused to consider bond for the vast majority of Artesia detainees, even though release of such families was routine prior to June 2014.⁸³ As pro bono attorneys appeared on the scene, they began to routinely file motions seeking immigration judge bond redeterminations. These efforts were met with considerable resistance. Regardless of the strength of an individual claim—not to mention the traumatic impact that detention has on women and children seeking asylum⁸⁴—government attorneys argued at every

80. *Id.* § 1225(a).

81. 8 C.F.R. § 1236.1(c)(8) (2014).

82. *In re X-K-*, 23 I & N Dec. 731, 734-36 (B.I.A. 2005) (rejecting the argument that those who are initially subject to expedited removal remain under the exclusive custody jurisdiction of the Department of Homeland Security even after they are found to have a credible fear and are awaiting a regular removal proceeding). A Board of Immigration decision confirms that an individual who receives a positive credible fear finding is treated like any other respondent in removal proceedings, and thus can seek bond redetermination before an Immigration Judge. *See id.*

83. *R.I.L.-R v. Johnson*, No. 15-11 (JEB), 2015 WL 737117, at *1 (D.D.C. Feb. 20, 2015) (granting preliminary injunction against ICE policy). ICE released only 1%—32 out of 2602 individuals—booked into a family detention center between June 1, 2014, and December 6, 2014. *Id.* at *4.

84. *See, e.g.,* INT’L DETENTION CTR., CAPTURED CHILDHOOD 48 (2012), available at <http://idcoalition.org/wp-content/uploads/2012/03/IDC-Captured-Childhood-Report-Chap-5.pdf>; Esther Yu-Hsi Lee, *Migrant Woman Attempted Suicide Minutes After Realizing She Can’t Afford Her Own Release*, THINKPROGRESS.ORG, (Mar. 12, 2015), <http://thinkprogress.org/immigration/2015/03/12/3633003/honduran-woman-attempts-suicide-over-high-bond/>. *See generally* THE PSYCHOLOGICAL IMPACT OF DETENTION AND DEPORTATION ON U.S. MIGRANT CHILDREN AND FAMILIES (2013), available at <http://www.bc.edu/content/dam/files/centers/humanrights/doc/IACHR%20Report%20on%20Pyschosocial%20Impact%20of%20Detention%20Deportation-FINAL%208-16-13.pdf>.

hearing that bond should be denied.⁸⁵ And immigration judges hearing Artesia bond cases set bonds far higher than what previously would have been expected for those who had passed a credible free screening.⁸⁶ These “no bond” and “high bond” policies carried forward to new detention facilities opened in Texas to detain additional Central American families.⁸⁷

The almost-universal refusal of ICE officers to release Central American families, coupled with the government’s argument before immigration judges that bond should be denied in every case, reflects what Professor Taylor has termed the “symbolic” component of immigration detention.⁸⁸ The crux of the government’s position is that mass detention deters future migration or, as a high-level ICE official said in an affidavit filed in every case, “implementation of a ‘no bond’ or ‘high bond’ policy would significantly reduce the unlawful mass migration of Guatemalans, Hondurans, and Salvadoran[s].”⁸⁹ This argument rested in part on a 2003 decision from the Office of the Attorney General, *In re D-J*, which mandated detention without bond for Haitian asylum-seekers arriving by boat in 2002.⁹⁰ That decision held that bond could be denied for “national security interests” where there is a “substantial prospect” that release would come to the attention of other would-be migrants and encourage future “surges in . . . illegal migration.”⁹¹

Notably, empirical evidence did not support the government’s assertion that “the high probability of a prompt release, coupled with the likelihood of low bond, is among the reasons [the migrants] are coming to the United States.”⁹² In fact, once the government’s “no bond” affidavits were made

85. In opposition to every bond motion made at Artesia, the government submitted two affidavits. *See, e.g.*, Affidavit of Philip T. Miller at 2, *available at* https://drive.google.com/file/d/0B_6gbFPjVDoxNG54N00yc0hRMjQ/edit; Affidavit of Traci A. Lembke at 2, *available at* https://drive.google.com/file/d/0B_6gbFPjVDoxNG54N00yc0hRMjQ/edit.

86. Nationwide, an average bond hearing for a detainee lasts about thirty minutes, and the typical bond is a few thousand dollars. Manning, *supra* note 24. When Artesia detainees “appeared” before Arlington IJs, initial project data indicated that the mean bond amount was \$17,000. *Id.* Volunteer attorneys at Artesia realized that “the Obama Administration was intentionally distorting the typical bond process.” *Id.*

87. *See infra* notes 106-112 and accompanying text.

88. *See* Taylor, *Symbolic Detention*, *supra* note 35, at 155 (1997); Taylor, *Dangerous by Decree*, *supra* note 35, at 166.

89. Affidavit of Miller, *supra* note 85, at 2.

90. *In re D-J*, 23 I & N Dec. 572, 574 (A.G. 2003).

91. *Id.* at 579.

92. Compare Affidavit of Lembke, *supra* note 85, at 2, with *R.I.L.-R v. Johnson*, No. 15-11(JEB), 2015 WL 737117, at *18 (D.D.C. Feb. 20, 2015).

public, an academic researcher whose work was referenced by the government expressly disavowed these assertions.⁹³ Nevertheless, while the governing regulation directs ICE to ascertain whether release “would pose a danger to property or persons,” and whether the individual “is likely to appear for any future proceeding,”⁹⁴ at Artesia the decision to detain or release was seldom made based on the individual facts of any case. Instead, the government employed mass detention for its supposed deterrent effect—to “send a message” to other would-be migrants.

In January 2015, a class action lawsuit, *R.I.L.-R v. Johnson*, was filed challenging the symbolic detention of Central American families.⁹⁵ On February 20, 2015, the U.S. District Court for the District of Columbia granted a preliminary injunction that prohibits the Department of Homeland Security from “detaining class members for the purpose of deterring future immigration to the United States and from considering deterrence of such immigration as a factor in [its] custody determinations.”⁹⁶ While the *R.I.L.-R* decision is not a final ruling on the merits, the opinion is important in two respects.

First, *R.I.L.-R* rejected the government’s argument that procedural due process does not apply to noncitizens who are apprehended soon after evading inspection to enter the United States.⁹⁷ This assertion flies in the

93. The Miller and Lembke affidavits expressly relied on a 2014 article co-authored by Professor Jonathan Hiskey. Affidavit of Miller, *supra* note 85, at 2; Affidavit of Lembke, *supra* note 85, at 2. Yet Hiskey wrote a responsive affidavit, calling the government’s assertions “not empirically supported.” Affidavit of Jonathan Hiskey, *R.I.L.R. v. Johnson*, No. 1:15-cv-00011-JEB (D.D.C. Jan. 8, 2015), available at https://www.aclu.org/sites/default/files/assets/2015.01.08_009_amended_pi_motion_with_exhibits.pdf. Hiskey was joined by Professor Nestor Rodriguez, who wrote, “[R]umors regarding lenient immigration detention policies in the United States are not a significant factor motivating current Central American immigration.” Affidavit of Nestor Rodriguez, *R.I.L.R. v. Johnson*, No. 1:15-cv-00011-JEB (D.D.C. Jan. 8, 2015), available at https://www.aclu.org/sites/default/files/assets/2015.01.08_009_amended_pi_motion_with_exhibits.pdf.

94. 8 C.F.R. § 1236.1(c)(8) (2014).

95. *R.I.L.-R*, 2015 WL 737117, at *1. The named plaintiffs were mothers accompanied by children who fled severe violence in Central America and were detained at the Karnes City Residential Facility in Texas. *Id.* at *2.

96. Order at 1, *R.I.L.-R v. Johnson*, No. 15-11 (JEB) (D.D.C. Feb. 20, 2015), available at https://www.aclu.org/sites/default/files/assets/order_0.pdf.

97. In *R.I.L.-R*, the government asserted that since the plaintiff class was “comprised of noncitizens . . . whose entry into this country was unlawful. It follows . . . that ‘[p]laintiffs have extremely limited, if any, due process rights regarding [their] custody determinations.’” *R.I.L.-R*, 2015 WL 737117, at *16. In the individual challenge to an expedited removal order

face of Supreme Court precedent holding that “aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”⁹⁸ The door was opened to argue that this precedent no longer applied, however, when Congress concluded in 1996 that individuals who enter without inspection should be treated as applicants for admission, and further when the Department of Homeland Security (pursuant to the express delegation in the statute)⁹⁹ decided in 2004 that certain individuals who entered without inspection would be subject to expedited removal.¹⁰⁰ For the most part, the question has been largely academic,¹⁰¹ but Artesia has brought it front and center. Increasingly, government attorneys have been arguing that well-settled Supreme Court precedent regarding the due process rights of noncitizens who have entered the United States is supplanted by the post-2004 expedited removal regime. In *R.I.L.-R*, the district court correctly concluded that (to borrow the words of Professor Martin) “Congress can refashion statutory distinctions, but it does not have the authority to redraw constitutional dividing lines.”¹⁰²

in *M.S.P.C. v. United States Customs & Board Patrol*, the district court undertook an extensive analysis of plenary power precedent before concluding in dicta that the petitioner, who had been apprehended nine miles from the border within thirty minutes of crossing, should have her status assimilated to that of an arriving alien and thus “has no constitutional due process rights.” *M.S.P.C. v. U.S. Customs & Border Protection*, No. 14-769 JCH/CG, 2014 WL 6476125 (D. N.M. Oct. 16, 2014); *see also* *Diaz Rodriguez v. U.S. Customs & Border Protection*, No. 6:14-cv-2716, 2014 WL 4675182, at *4 (W.D. La. Sept. 18, 2014) (noting an illegal entrant subject to an expedited removal order who had been present less than two weeks “has not shown that he has been lawfully admitted, so the due process rights of a lawfully admitted citizen are not implicated here”).

98. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (citation omitted); *see also* *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

99. The United States Code permits the Attorney General (now the Department of Homeland Security) to apply expedited removal procedures to “an alien . . . who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for [a] 2-year period.” 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2012).

100. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-78 (Aug. 11, 2004).

101. *See* Martin, *Two Cheers*, *supra* note 39, at 688-90; Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 571-77 (2010).

102. Martin, *Two Cheers*, *supra* note 39, at 689.

Second, the *R.I.L.-R* preliminary injunction strongly affirmed that immigrants cannot be detained without regard to the merits of their individual cases in order to deter possible future migration by others.¹⁰³ To be sure, the opinion was not the final decision on the merits, and it was not a constitutional holding. Instead, the district court invoked the familiar canon of constitutional avoidance¹⁰⁴ to conclude that serious doubts would arise as to the constitutionality of the detention statute if it were interpreted to permit symbolic detention intended to “send a message” to someone else.¹⁰⁵ While this is not a startling conclusion, it has not always been pronounced with clarity by the Supreme Court in the immigration context. In fact, the most explicit articulation of this principle comes from a dissenting opinion by Justice Souter, who opposed mandatory detention of criminal offenders during the pendency of deportation proceedings by noting: “Due process calls for an individual determination before someone is locked away.”¹⁰⁶

C. *Beyond Artesia*

On December 18, 2014, Artesia closed its doors.¹⁰⁷ But the end of Artesia, which was always intended to be a temporary facility,¹⁰⁸ has not meant the end of family detention. To the contrary, the Obama Administration has opened new detention facilities to confine mothers and their children who are fleeing violence in Central America. In early August 2014, a new facility was opened in Karnes City, Texas, with the capacity to

103. *R.I.L.-R v. Johnson*, No. 15-11(JEB), 2015 WL 737117, at *1 (D.D.C. Feb. 20, 2015).

104. *Id.* at *15 (citing *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)). The role that the constitutional avoidance canon plays in immigration law is explained in Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

105. *R.I.L.-R*, 2015 WL 737117, at *17.

106. *Demore v. Kim*, 538 U.S. 510, 551 (2003) (Souter, J., concurring in part). For an analysis of *Demore v. Kim*, and of precedent outside the immigration context that reflects this understanding, see Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343 (David A. Martin & Peter H. Schuck eds., 2005).

107. Kit Johnson, *Last Migrant Families Transferred from Artesia to Dilley*, IMMIGRATIONPROFBLOG (Dec. 20, 2014), <http://lawprofessors.typepad.com/immigration/2014/12/last-migrant-families-transferred-from-artesia-to-dilley.html>.

108. *Fact Sheet: Artesia Temporary Facility for Adults with Children in Expedited Removal*, DEP'T OF HUM. SERVICES, <http://www.dhs.gov/news/2014/06/20/fact-sheet-artesia-temporary-facility-adults-children-expedited-removal> (last visited Apr. 13, 2015).

hold 608 women and children.¹⁰⁹ And in December 2014, another family detention facility opened in Dilley, Texas,¹¹⁰ a site that had been previously used as a camp for oil field workers.¹¹¹ The Dilley detention center can hold up to 2400 women and children.¹¹²

Immigration officials are back-pedaling from some of the most egregious policies at Artesia, as they try to put a softer face on detention in what they call “family residential centers.”¹¹³ Brightly colored painted animals adorn the walls of concrete rooms at Karnes City, and Dilley has an outdoor jungle gym and a flat screen television.¹¹⁴ While crayons that were once considered contraband for attorneys to bring into Artesia,¹¹⁵ they likely can be found in the nursery school, classrooms, and library at the Dilley facility.¹¹⁶

But a prison stocked with crayons is still a prison,¹¹⁷ and the new facilities are operated by for-profit corrections companies with very poor records for providing humane and appropriate conditions of confinement. Indeed, the Corrections Corporation of America—charged with building and operating the Dilley facility—was also responsible for the T. Don Hutto family detention center in Taylor, Texas, which the Obama Administration

109. Press Release, Dep’t of Homeland Security, South Texas ICE Detention Facility to House Adults with Children (July 31, 2014), available at <http://www.dhs.gov/news/2014/07/31/south-texas-ice-detention-facility-house-adults-children>; Brian Bennett, *A Kinder, Gentler Immigration Detention Center*, L.A. TIMES, Mar. 17, 2012, <http://articles.latimes.com/2012/mar/17/nation/la-na-detention-salad-bar-20120318>; Julia Preston, *As U.S. Speeds the Path to Deportation, Distress Fills New Family Detention Centers*, N.Y. TIMES, Aug. 5, 2014, http://www.nytimes.com/2014/08/06/us/seeking-to-stop-migrants-from-risk-ing-trip-us-speeds-the-path-to-deportation-for-families.html?_r=0.

110. Preston, *supra* note 33.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Kathleen McCleery, *Reporter’s Notebook: Dispute Simmers at Border Detention Center Over . . . Crayons*, PBS NEWSHOUR (Aug. 25, 2014, 5:59 PM EDT), <http://www.pbs.org/newshour/updates/battle-rages-new-mexico-border-detention-center-crayons/>.

116. Preston, *supra* note 33.

117. Matthew Archambeault, *Prisons with Crayons: Our Grapes of Wrath*, REDIRECT (Nov. 10, 2014), <http://c2cimmigration.wordpress.com/2014/11/10/prisons-with-crayons-our-grapes-of-wrath/>; see also Victoria Rossi, *Seeking Asylum in Karnes City*, TEX. OBSERVER (Feb. 2, 2015), <http://www.texasobserver.org/seeking-asylum-karnes-city/>.

agreed to close in 2009 after public outcry and a lawsuit challenging the facility's deplorable conditions.¹¹⁸

IV. Conclusion

Although *Chae Chan Ping* was decided more than a century ago, its influence echoes today. When the Obama Administration chose to respond to the women with children migrating in 2014 by applying expedited removal procedures, pre-determining the outcome of their credible fear screenings, denying bond to potentially meritorious asylum-seekers, and insisting on the unavailability of procedural due process protections, it did so out of the same fears of mass migration that underlay the *Chae Chan Ping* decision. The nationalities of the players may have changed, but the appeal to panic remains the same.

118. See Hylton, *supra* 68; *ACLU Challenges Prison-like Conditions at Hutto Center*, ACLU, <https://www.aclu.org/immigrants-rights-racial-justice-prisoners-rights/aclu-challenges-prison-conditions-hutto-detention> (last visited Apr. 16, 2015). A recent documentary compellingly covers issues surrounding the T. Don Hutto facility. *THE LEAST OF THESE* (La Sonrisa Productions Inc. 2009).