

# Mexican Journalist Seeking Asylum Finally Free From Detention

By Chuck Tobin, Steven D. Zansberg and Mark Flores

Under pressure from a federal judge to rebut well-grounded charges that it jailed the Mexican journalist for speaking out against the Trump Administration's policies, the U.S. Department of Homeland Security has released Emilio Gutiérrez-Soto from detention. He and his son Oscar, also released, continue their fight to remain in the United States.

Emilio and Oscar had been detained in an El Paso, Texas facility for more than seven months, after they were arrested at a routine check-in last fall with Immigration and Customs Enforcement (ICE) officials while their asylum case remained pending.

The timeline of Emilio's and Oscar's immigration experience became critical in winning their release from detention:

- In 2008, Emilio and Oscar, who was then 15 years old, crossed into the United States after Emilio received credible death threats as a result of his newspaper reporting on corruption in the Mexican military. After entering lawfully at a port of entry, they were processed by immigration officials, found to have a credible fear of persecution, and placed on a docket for an administrative hearing on their asylum claim.
- For the next nine years, the Gutiérrez-Sotos lived peacefully, operating a food truck in Las Cruces, New Mexico, where they also forged strong ties to the community.
- In July 2017, immigration Judge Robert S. Hough in El Paso denied the Gutiérrez-Sotos' asylum claim. Judge Hough found that Emilio's claim of death threats as a result of his reporting was not credible, and ordered the two men deported. Hough relied, in part, on the lack of actual clippings provided in support of Gutierrez-Soto's claim that he worked as a journalist. The Gutiérrez-Sotos appealed that ruling, and they remained free pending the appeal.
- In October 2017, the National Press Club awarded its prestigious John Aubuchon Freedom of the Press Award to Emilio on behalf of the entire Mexican press corps. During his acceptance speech, he sharply criticized U.S. immigration policy, saying the nation had "bartered away international law."
- In December 2017, the Gutiérrez-Sotos were taken into custody by ICE officials. While the Gutiérrez-Sotos were literally being driven to the border near El Paso, the

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Department of Justice Board of Immigration Appeals (BIA) stayed their deportation pending the appeal. But the men remained in detention in El Paso.

The Gutiérrez-Sotos pursued their administrative appeal, and, at the same time, filed a *habeas corpus* petition in the U.S. District Court for the Western District of Texas. The Media Law Resource Center, the National Press Club and the National Press Club Journalism Institute, among more than a dozen other journalism nonprofit organizations, filed *amicus* briefs in support of the Gutierrez-Sotos before both the BIA and in the federal habeas case.

As reported in last month's *Media Law Letter*, in May, the BIA ordered that the Gutierrez-Sotos are entitled to re-open their asylum hearing before the immigration judge, to introduce additional evidence concerning Emilio's work as a professional journalist and the current conditions for reporters in Mexico, which the Committee to Protect Journalists has declared the most dangerous place to be a journalist outside of an active war zone. Nevertheless, ICE continued to detain Emilio and Oscar continued in El Paso.

In the *amicus* brief filed in support of the two men's *habeas* petition, the press organizations pointed to the closeness in time between Emilio Gutierrez's public criticisms in October 2017, and his detention in December 2017, as evidence of retaliatory animus:

As important is the ultimate resolution of their asylum petitions, so too is the manner in which our Nation treats these lawfully present asylum seekers during the pendency of those petitions. It would be an affront to this nation's founding principles to deprive Emilio and Oscar Gutiérrez-Soto of their freedom for one more day.

In a pivotal [July 10, 2018 Order](#), the federal judge held that Emilio and Oscar had established a *prima facie* case that their detention resulted from Emilio's public comments and his profession as a journalist, and the court denied the government's motion to dismiss their *habeas* petition. The judge cited email traffic among ICE officials about a list of people marked "non-detained targets" for detention (which included Emilio) and the "temporal proximity between Mr. Gutierrez-Soto's criticism of ICE" and Emilio and Oscar being taken into custody by ICE. The judge also cited an ICE official's comment to National Press Club Executive Director Bill McCarren – who flew to El Paso to plead for the men's release – to "tone it down." The federal court agreed that ICE's admonition to McCarren "could be taken as evidence that ICE disapproves of negative publicity" about immigration policies.

U.S. District Judge David Campos Guaderrama held:

Taking all of this evidence into account, Petitioners have offered enough evidence to create a genuine issue of material fact regarding whether Respondents violated their First Amendment rights. Petitioners have offered

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evidence that allows for an inference that they were targeted before their asylum case was denied and ICE officials did not approve of the negative press that Petitioners were generating. Drawing these inferences in favor of Petitioners, the nonmoving party, there is support for Petitioners' claim that Respondents retaliated against them for asserting their free press rights. This is also sufficient evidence for the trier of fact, drawing all reasonable inferences in favor of Petitioners, to conclude that Respondents' reason for set of strategic detaining Petitioners is a pretext.

The judge ordered ICE to appear in court for an evidentiary hearing on August 1 and further ordered that the two petitioners be physically present at the hearing. ICE immediately moved for a continuance, which the judge, finding that “time is of the essence,” denied.

In brilliant moves immediately after these rulings, Emilio and Oscar’s counsel sent ICE probing discovery seeking more documents and information about their case and about targeted immigration enforcement in general. The government filed a motion challenging that far-reaching discovery, but the judge ordered ICE to produce some of the requested information. The government and the Gutiérrez-Soto’s lawyers also engaged in intense settlement negotiations.

Faced with the impending deadline to produce potentially embarrassing ICE records, the government agreed to release the men. On the evening of July 26, Emilio and Oscar walked out of the detention facility greeted by an array of journalists waiting to cover their release.

Key to both the immigration and *habeas* proceedings are 130 pages of news reports, appended to the *amicus* briefing, that Emilio had prepared and that were published in the *El Diario del Noroeste of Nuevo Casas Grandes* in Ascension, Chihuahua, before he fled Mexico in 2008. The articles were not put before the immigration judge by the Gutiérrez-Sotos’ previous immigration lawyer at the time of his original asylum hearing. Emilio’s journalism, however, is now firmly in the record for the remanded asylum proceeding.

It is believed that Judge Guadarrama set the August 1<sup>st</sup> hearing in recognition of an impending deadline: Emilio had been awarded the prestigious Knight Wallace Fellowship for Journalists at the University of Michigan for the academic year 2018-19. The program begins in September. Now that he is free, he will perform that fellowship while his asylum proceedings continue.

The complete list of the amici supporting the Gutiérrez-Sotos are: the National Press Club; the National Press Club Journalism Institute; the Media Law Resource Center; The Reporters Committee for Freedom of the Press; American Society of News Editors; Association of Alternative Newsmedia; Radio Television Digital News Association; American Society of

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Journalists and Authors; Society of Professional Journalists; Reporters Without Borders; PEN America; The Alicia Patterson Journalism Foundation; Knight-Wallace Fellowships for Journalists, Wallace House, University of Michigan; Society of American Business Editors and Writers; National Press Foundation; Pulitzer Center on Crisis Reporting; and Fundamedios, Inc.

*The 17 amici are represented by Chuck Tobin in Washington D.C. and Steve Zansberg in Denver, both partners with Ballard Spahr LLP, and Mark Flores of Littler Mendelson, P.C. in Dallas, Texas. The United States Department of Homeland Security is represented by Stephany Miranda, Assistant Chief Counsel of the U.S. Department of Homeland Security. Emilio and Oscar Gutiérrez-Soto are represented by Eduardo Beckett of El Paso, Texas and Penny M. Venetis, Professor of Law and Director of the International Human Rights Clinic at the Rutgers University College of Law in Newark, New Jersey.*



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