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Sunlight is the Best Disinfectant: The Role of the Media in Shaping Immigration Policy

Ana Pottratz Acosta

Mitchell Hamline School of Law, ana.pottratzacosta@mitchellhamline.edu

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SUNLIGHT IS THE BEST DISINFECTANT: THE ROLE OF THE MEDIA IN SHAPING IMMIGRATION POLICY

Ana Pottratz Acosta[†]

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[†] Ana Pottratz Acosta is an Assistant Teaching Professor at Mitchell Hamline School of Law, teaching Immigration Law and overseeing the Medical-Legal Partnership program. Prior to joining the faculty of Mitchell Hamline, Ms. Pottratz Acosta worked as an employment-based immigration attorney at the firm of Stinson Leonard Street LLP, and as a supervising attorney with the Lutheran Social Services of New York (LSSNY) – Immigration Program.

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I. INTRODUCTION

On February 21, 2017, one month and one day after the inauguration of Donald Trump as the forty-fifth President of the United States, the Washington Post debuted a new slogan: “Democracy Dies in Darkness.”¹ This phrase draws on our country’s tradition of recognizing the importance of a free and open press,² but is it still true? In today’s world, does the media still play a fundamental role as a check on our government? Furthermore, in areas like immigration law, where considerable power and deference lies with the President and Department of Homeland Security, what

1. Joe Concha, *The Washington Post: ‘Democracy Dies in Darkness’*, THE HILL (Feb. 22, 2017, 11:12 AM), <http://thehill.com/homenews/media/320619-the-washington-post-democracy-dies-in-darkness> [https://perma.cc/GUR2-5EE4]; see Paul Farhi, *The Washington Post’s New Slogan Turns out to be an Old Saying*, WASH. POST. (Feb. 24, 2017), https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-la3817ac21a5_story.html?utm_term=.d2c3e3126027 [https://perma.cc/QM8Q-UWUX].

2. See Stephen J. Shapiro, *One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation*, 8 MEDIA L. & POL’Y 1, 2 (1999).

is the role of the “Fourth Estate” in holding governmental institutions accountable?

This article examines these questions by analyzing the role of the press in shaping immigration policy by the Obama and Trump Administrations with respect to two groups: Central American asylum seekers—particularly unaccompanied minors and family units—and Syrian refugees. The article first examines how press coverage and public engagement served as a check on the Obama Administration and shaped President Obama's response to the Central American Migrant Crisis and Syrian Refugee Crisis during his second term.³ The article then describes executive actions taken by the Trump Administration that adversely impacted Central American asylum seekers and Syrian refugees, and analyzes how media coverage shaped the Trump Administration's ability to implement policies against these groups.⁴

II. TWO HUMANITARIAN CALAMITIES: CENTRAL AMERICAN MIGRANT CRISIS AND SYRIAN REFUGEE CRISIS

In his second term, President Obama faced two humanitarian emergencies: the Central American Migrant Crisis and the Syrian Refugee Crisis. There were a number of external factors that influenced the Obama Administration's response to these events, the most obvious being the proximity of the Central American Migrant Crisis at the southern border. The available data suggests that media coverage did play a role in President Obama's response.

A. *Central American Migrant Crisis*

In the summer of 2014, the Obama Administration faced a crisis along the southern border.⁵ While the total number of illegal crossings remained historically low,⁶ the spring and summer of 2014

3. See *infra* Part II.

4. See *infra* Part III.

5. See Richard Cowan, *Waves of Immigrant Minors Present Crisis for Obama, Congress*, REUTERS (May 28, 2014, 8:26 AM), <https://www.reuters.com/article/us-usa-immigration-children/waves-of-immigrant-minors-present-crisis-for-obama-congress-idUSKBN0E814T20140528> [<https://perma.cc/3MJE-XCS5>] (“Tens of thousands of children unaccompanied by parents or relatives are flooding across the southern U.S. border illegally, forcing the Obama administration and Congress to grapple with both a humanitarian crisis and a budget dilemma.”).

6. The total number of Customs and Border Protection (CBP) apprehensions at the southern border in FY 2014, typically used as an indicator of the total number

saw a surge of unaccompanied minors and family units with children from Central America apprehended at the border.⁷

For President Obama—who was hoping to pass comprehensive immigration reform or, at minimum, use executive action to expand protections for undocumented immigrants through the Deferred Action for Parents of American and Lawful Permanent Residents (DAPA) program⁸—this crisis could not have happened at a worse time.⁹ With midterm elections only a few months away, the Obama

of illegal crossings, was 479,371, on par with the historically low number of apprehensions since FY 2010. *See* U.S. CUSTOMS & BORDER PROT., DEP'T OF HOMELAND SEC., U.S. BORDER PATROL TOTAL MONTHLY APPREHENSIONS (FY 2000–FY 2017) (Dec. 2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017Dec/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area%2C%20FY2000-FY2017.pdf> [<https://perma.cc/9RS9-A36H>].

7. In the third quarter of FY 2014 (April–June 2014), CBP apprehended a total of 35,563 individuals traveling as family units (often women with small children) and 28,904 unaccompanied minors. *See* U.S. CUSTOMS & BORDER PROT., DEP'T OF HOMELAND SEC., U.S. BORDER PATROL TOTAL MONTHLY FAMILY UNIT APPREHENSIONS BY SECTOR (FY 2013 - FY 2017) (Dec. 2017), <https://www.cbp.gov/sites/default/files/assets/documents/2016Oct/BP%20Total%20Monthly%20Family%20Units%20by%20Sector%2C%20FY13-FY16.pdf> [<https://perma.cc/UEN3-92RE>]; *see also* Press Release, Jeh Johnson, Sec'y, Dep't of Homeland Sec., Statement About Situation Along the Southern Border (Sept. 8, 2014), <https://www.dhs.gov/news/2014/09/08/statement-secretary-johnson-about-situation-along-southwest-border> [<https://perma.cc/4XH9-APRD>].

8. On November 20, 2014, DHS Secretary Jeh Johnson issued a memorandum directing DHS to extend deferred action protections to parents of U.S. citizens and lawful permanent residents who continuously resided in the U.S. since January 1, 2010, in a program known as DAPA. *See* Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec. to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs. et al. 4 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<https://perma.cc/R5JZ-DT64>]. The memorandum also expanded protections under the Deferred Action for Childhood Arrivals (DACA) program. *See id.* at 3–4.

9. In an interview on NBC's Meet the Press on September 7, 2014, when questioned on his decision to delay any executive action on immigration until after the midterm elections, President Obama acknowledged that the Central American Migrant Crisis made it difficult, politically, to move forward with these planned measures, stating:

Not only do I want to make sure that the T's are crossed and the I's are dotted, but here's the other thing, Chuck, and I'm being honest now, about the politics of it. This problem with unaccompanied children that we saw a couple weeks ago, where you had from Central America a surge of kids who are showing up at the border, got a lot of attention. And a lot of Americans started thinking, "We've got this immigration crisis on

Administration made the pragmatic decision to take a hardline approach and eliminate the problem as quickly as possible—prioritizing the quick return of Central Americans and deterring future migration above all else.¹⁰ However, after months of negative media coverage and outcry from immigration advocates, the Obama Administration ultimately adopted a more humane approach toward Central American women and children apprehended at the border.¹¹

1. *Cause of the Central American Migrant Crisis – Background on the Northern Triangle*

In recent years, the Central American countries of Guatemala, Honduras, and El Salvador (collectively known as the “Northern Triangle”) have experienced a dramatic uptick of violence, largely at the hands of violent gangs and drug cartels.¹² Between 2005 and 2015, over 150,000 people in the Northern Triangle were murdered.¹³ According to data from the World Bank, in 2015, El Salvador had the highest homicide rate per capita with a staggering

our hands.” And what I want to do is when I take executive action, I want to make sure that it’s sustainable.

Interview by Chuck Todd, Political Director, NBC News, with Barack Obama, U.S. President (Sept. 4, 2014), in NBC NEWS: MEET THE PRESS, <https://www.nbcnews.com/meet-the-press/president-barack-obamas-full-interview-nbcs-chuck-todd-n197616> [<https://perma.cc/7XZL-7VPR>]; see Paul Lewis & Dan Roberts, *Democrats Tell Obama: Drop Immigration Reform to Save Senate*, THE GUARDIAN (Sept. 5, 2014, 1:35 PM), <https://www.theguardian.com/world/2014/sep/05/obama-pressure-democrats-abandon-immigration-reform> [<https://perma.cc/W9F8-FLFC>].

10. Press Release, The White House Office of the Press Secretary, The Obama Administration’s Government-Wide Response to Influx of Central American Migrants at the Southwest Border (Aug. 1, 2014) [hereinafter August 2014 Immigration Press Release], <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american-> [<https://perma.cc/4P2Y-2LTC>].

11. See *infra* Part II.A.4.

12. Suchit Chavez & Jessica Avalos, *The Northern Triangle: The Countries That Don’t Cry for Their Dead*, INSIGHT CRIME (Apr. 23, 2014), <https://www.insightcrime.org/news/analysis/the-northern-triangle-the-countries-that-dont-cry-for-their-dead/> [<https://perma.cc/BMW5-PDDX>].

13. *Intentional Homicide, Counts and Rates per 100,000 Population*, U.N. OFF. ON DRUGS & CRIME, <https://data.unodc.org/#state> [<https://perma.cc/5H4F-5DP8>] (follow “Crime and Criminal Justice” hyperlink; then follow “Homicide” hyperlink; then follow “Homicide counts and rates (2000-2015)” hyperlink; then select “Run Report”) (last visited June 20, 2018).

108.64 killing deaths per 100,000, and Honduras had the second highest rate with 63.75 deaths per 100,000.¹⁴ While no data is available for Guatemala from 2015, in 2014, Guatemala had the seventh highest murder rate per capita with 31.21 deaths per 100,000.¹⁵

At the root of the high homicide rate in the Northern Triangle is the marked uptick in violent activity by the Mara Salvatrucha (MS-13), the 18th Street Gang, and other sophisticated criminal enterprises.¹⁶ In many parts of Guatemala, El Salvador, and Honduras, these gangs are able to operate with impunity—terrorizing citizens, demanding bribes, and engaging in “forced recruitment” of young residents, particularly teenage boys.¹⁷ According to a 2012 report by the U.N. Office of Drugs and Crime (UNODC), an estimated 54,000 Northern Triangle residents are members of either the MS-13 or the 18th Street Gang.¹⁸

Women and girls in the Northern Triangle are also at increased risk of violence and death.¹⁹ In Honduras, gender-based violence, including domestic violence, is the second highest cause of death for women of reproductive age.²⁰ Yet, perpetrators in Honduras are rarely brought to justice.²¹ El Salvador’s justice system routinely fails

14. *Id.*

15. *Id.*

16. See CLARE RIBANDO SEELKE, CONG. RES. SERV., GANGS IN CENTRAL AMERICA 5–7 (2016), <https://fas.org/sgp/crs/row/RL34112.pdf> [<https://perma.cc/7XR6-CNSE>]; see also U.N. HIGH COMM’R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 16 (2015), <http://www.unhcr.org/5630f24c6.pdf> [<https://perma.cc/7PFY-AXPM>].

17. See JESSICA JONES & JENNIFER PODKUL, WOMEN’S REFUGEE COMM’N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 9–13 (Oct. 15, 2012) [hereinafter WOMEN’S REFUGEE COMMISSION REPORT—CENTRAL AMERICA], <https://www.womensrefugeecommission.org/component/zdocs/document?id=844-forced-from-home-the-lost-boys-and-girls-of-central-america> [<https://perma.cc/M8J6-CEF9>] (follow “Forced From Home: The Lost Boys and Girls of Central America” hyperlink).

18. U.N. OFF. ON DRUGS & CRIME, TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN: A THREAT ASSESSMENT 27–28 (2012), https://www.unodc.org/documents/data-andanalysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf [<https://perma.cc/JFY2-5CEM>].

19. WOMEN’S REFUGEE COMMISSION REPORT—CENTRAL AMERICA, *supra* note 17, at 9–13.

20. *Id.* at 10.

21. While homicide was the second highest cause of death for Honduran women in 2010, perpetrators were largely unpunished. See *id.* Between 2005 and 2010, 96 percent of all reported femicide cases went uninvestigated and

to prosecute femicides and other crimes against women, despite the brutal nature of these crimes.²² In Guatemala, the dramatic increase in violent crimes against women and femicide has risen to epidemic levels, with the United Nations and other NGOs expressing serious concerns over the spiraling rates of rape, torture, and murder of women.²³ Equally troubling, several NGOs have reported that the MS-13, the 18th Street Gang, and other cartels are committing systematic physical and sexual abuse against women in the Northern Triangle.²⁴

By 2014, the instability in the Northern Triangle spilled across the southern border of the United States. In fiscal year (FY) 2014, there were a total of 479,371 individuals apprehended along the U.S.-Mexico border, with a dramatic surge in apprehensions of Central Americans from the Northern Triangle.²⁵ Of particular note,

unprosecuted. *See id.*; *see also* Annie Kelly, *Honduran Police Turn a Blind Eye To Soaring Number of Femicides*, THE GUARDIAN (May 28, 2011), <http://www.guardian.co.uk/world/2011/may/29/honduras-blind-eye-femicides> [<https://perma.cc/6B9Y-FJKS>].

22. IMMIGR. & REFUGEE BD. OF CAN., EL SALVADOR: VIOLENCE AGAINST WOMEN, INCLUDING NON-DOMESTIC SEXUAL VIOLENCE, LEGISLATION, STATE PROTECTION AND SUPPORT SERVICES (2015), <http://www.refworld.org/docid/560b8b294.html> [<https://perma.cc/BA6C-NYAJ>].

23. *See* Karen Musalo & Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 HASTINGS RACE & POVERTY L.J. 265, 269–73 (2013), https://cgrs.uchastings.edu/sites/default/files/Musalo_Bookey_CrimesWithoutPunishment_2013.pdf [<https://perma.cc/8FQH-D7RH>]. *See generally* U.N. General Assembly, *Annual Report of the United Nations High Commissioner for Human Rights: Report of the United Nations High Commissioner for Human Rights on the Activities of Her Office in Guatemala*, U.N. Doc. A/HRC/19/21/Add.1 (Jan. 30, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.21.Add.1_en.pdf [<https://perma.cc/4UB7-7UZA>] (providing an overview of the “human rights situation in Guatemala” in 2011).

24. *See* RIBANDO SEELKE, *supra* note 16, at 6. *See generally* KIDS IN NEED OF DEFENSE, NEITHER SECURITY NOR JUSTICE: SEXUAL AND GENDER-BASED VIOLENCE AND GANG VIOLENCE IN EL SALVADOR, HONDURAS, AND GUATEMALA 4–7 (2017), https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf [<https://perma.cc/NSW4-JWL8>] (examining the “relationship between gang violence and SGBC in El Salvador, Honduras, and Guatemala.”).

25. In FY 2014, for the first time in history a majority of the apprehensions on the southern border were non-Mexican nationals, many of whom were from the Northern Triangle. *See* U.S. CUSTOMS & BORDER PROT., DEP'T OF HOMELAND SEC., APPREHENSION/SEIZURE STAT. (2014), <https://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf> [<https://perma.cc/>

in FY 2014, nearly half of the Northern Triangle apprehensions on the southern border were unaccompanied minors and family units, often consisting of women traveling with young children.²⁶

2. *Initial Response by the Obama Administration to the Crisis*

While conditions in the Northern Triangle would suggest that the rise in apprehensions reflected a humanitarian crisis that forced thousands to flee violence and insecurity in their homeland, to the Obama Administration, the surge in Central American apprehensions was a huge political liability.²⁷ Mindful of the upcoming midterm elections and Republican rhetoric that President Obama was soft on border security,²⁸ the Administration initially chose to take a hardline policy against Central American migrants in an effort to appease conservative critics and mitigate negative conservative media coverage of the crisis.²⁹ Under this approach, the Obama Administration took the position that the apprehended Central Americans were “illegal migrants” who had no legal basis to remain in the U.S. and sought to return those apprehended to their home countries as quickly as possible.³⁰

PP8U-9YTX]. In FY 2014, there were 479,371 apprehensions, including 252,600 “Other Than Mexican” apprehensions. *See id.*

26. In FY 2014, Border Patrol apprehended a total of 61,334 guardians and children travelling as family units and 51,705 unaccompanied minors from El Salvador, Guatemala, and Honduras. U.S. CUSTOMS & BORDER PROT., DEP’T OF HOMELAND SEC., SW. BORDER SECTORS STAT. (2014), <https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14.pdf> [https://perma.cc/DB3J-J49J].

27. *See infra* notes 67–68.

28. Muzaffar Chishti et al., *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION INFO. SOURCE (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not> [https://perma.cc/EZM7-ZQKQ].

29. Amanda Sakuma, *Human Rights Groups Outraged Over Obama’s Deportation Proposal*, MSNBC (June 30, 2014), <http://www.msnbc.com/msnbc/human-rights-groups-outraged-over-obamas-deportation-proposal#51295> [https://perma.cc/UKP9-YFLR].

30. Press Release, Jeh Johnson, Sec’y, Dep’t of Homeland Sec., Statement Before Senate Appropriations Committee (July 10, 2014) [hereinafter DHS Sec. Johnson Senate Statement], <https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations> [https://perma.cc/B7GC-PWXP].

Department of Homeland Security (DHS) Secretary Jeh Johnson's statement to the Senate Appropriations Committee on July 10, 2014 clearly reflected this position.³¹ Although Secretary Johnson did note the humanitarian concerns related to the surge of Central American apprehensions—particularly unaccompanied minors and family units with small children—he also referred to the influx of Central American “illegal migrants” who would be swiftly returned, stating:

The recent and dramatic rise in illegal migration across our border, from Honduras, El Salvador and Guatemala, presents a major challenge to the United States. . . . But, in the final analysis, our border is not open to illegal migration. Our message is clear to those who try to illegally cross our borders: you will be sent back home. We have already added resources to expedite the removal, without a hearing before an immigration judge, of adults who come from these three countries without children. We have worked with the governments of these countries to repatriate the adults quicker Within the last several months, we have dramatically reduced the removal time of many of these migrants. Within the law, we are sending this group back, and we are sending them back quicker. Then there are adults who brought their children with them. Again, our message to this group is simple: we will send you back. We are building additional space to detain these groups and hold them until their expedited removal orders are effectuated.³²

The approach set forth by Secretary Johnson in his testimony to the Senate was quickly put into action by DHS and Department of Justice (DOJ).³³ In the spring and summer of 2014, the government deployed resources to the southern border to ensure the prompt processing and deportation of the recent arrivals through expedited removal proceedings.³⁴ In these limited proceedings, individuals are only allowed to request asylum and present evidence that they have a credible fear of persecution as a defense to removal.³⁵ Those who

31. *Id.*

32. *Id.*

33. See August 2014 Immigration Press Release, *supra* note 10.

34. *Id.*

35. See generally *A Primer on Expedited Removal*, AMERICAN IMMIGR. COUNCIL (Feb. 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_primer_on_expedited_removal.pdf [<https://perma.cc/LSB2-QD4K>]

are not able to establish a credible fear of return are swiftly deported to their country of origin, while those able to establish a credible fear of persecution are permitted to stay and present an application for asylum before an immigration judge.³⁶ Because of the presumption by the Obama Administration that a majority of newly arrived Central Americans did not have a viable asylum claim, credible fear passage rates dropped from 74 percent in May 2014 to 62 percent in July 2014,³⁷ making it possible for DHS to quickly process and remove many of the migrants apprehended during the crisis.

Additionally, to deter further migration from the Northern Triangle, DHS took the position that Central American asylum seekers, including family units with small children, should remain in detention while they pursued their asylum claims.³⁸ This marked a significant shift from the Obama Administration's 2009 policy directive, in place prior to the 2014 surge, which stated that it was in the public interest to release asylum seekers from detention after passing a credible fear interview.³⁹

To justify the Obama Administration's actions in response to the Central American surge, DHS officials cited the need to create a deterrent effect to discourage other Central Americans from making the dangerous journey from Mexico to the U.S.⁴⁰ Comments by

(discussing the use of expedited removal).

36. *Id.*

37. *Percentage Credible Fear Screenings with Positive Finding*, HUM. RTS. FIRST (Aug. 2014), <http://www.humanrightsfirst.org/sites/default/files/credible-fear-grant-rate-august-2014.pdf> [<https://perma.cc/876R-NP7C>].

38. In litigation challenging the detention of Central American asylum seekers, the DHS submitted declarations from two high-ranking Immigration and Customs Enforcement (ICE) officials. *See DHS Declarations from High-Ranking Immigration Officers on Blanket Policy of "No Release,"* AM. IMMIGR. L. ASS'N (Aug. 7, 2014) [hereinafter *Aug. 7 DHS Declarations*], <http://www.aila.org/infonet/dhs-blanket-policy-no-release> [<https://perma.cc/VK74-S3V8>]. The declarations confirmed the implementation of a "no bond" or "high bond" policy limiting release of asylum seekers from detention, in order to deter further migration from Guatemala, Honduras, and El Salvador. *See id.*

39. *See* U.S. IMMIGR & CUSTOMS ENFORCEMENT, ICE POLICY DIRECTIVE NO. 11002.1, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE ¶ 6.1 (Dec. 8, 2009) [hereinafter ICE 2009 DIRECTIVE 11002.1], https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf [<https://perma.cc/6AX3-MWV9>].

40. In a June 30, 2014, letter to Congress, President Obama requested additional funding to respond to the Central American Migrant Crisis to implement, among other measures, "an aggressive deterrence strategy focused on

Secretary Johnson and other senior DHS officials also seemed to reflect the presumption that none of the Central American women and children had a credible fear of persecution and suggested a desire to send them back as quickly as possible to deter additional migration.⁴¹ In June 2014, a senior government official told reporters visiting the Artesia Family Detention Center that “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.”⁴²

To implement these policies of mass detention and swift removal, DHS opened two family detention facilities in 2014 to detain and process women and children apprehended at the southern border.⁴³ The first of these facilities opened in Artesia, New Mexico, in late June 2014,⁴⁴ and a second facility opened two months later in Karnes City, Texas.⁴⁵

the removal and repatriation of recent border crossers.” Letter to Speaker of the House of Representatives John A. Boehner, Senate Majority Leader Harry M. Reid, Senate Minority Leader A. Mitchell McConnell, and House Democratic Leader Nancy Pelosi on Efforts To Address the Humanitarian Situation in the Río Grande Valley Areas of the United States-Mexico Border 2, 2014 DAILY COMP. PRES. DOC. 509 (June 30, 2009); see DHS Sec. Johnson Senate Statement, *supra* note 30; Aug. 7 DHS Declarations, *supra* note 38.

41. Mike Lillis, *DHS Chief Defends Child Detention*, THE HILL (Aug. 3, 2016, 4:37 PM), <http://thehill.com/policy/national-security/290316-dhs-chief-defends-child-detention-practices> [<https://perma.cc/WJD6-P8VH>].

42. Juan Carlos Llorca, *Fed Says They Will Expedite Deportations to 10-15 Days at N.M. Facility*, SEATTLE TIMES (June 26, 2014, 8:58 PM), <https://www.seattletimes.com/nation-world/fed-says-they-will-expedite-deportations-to-10-15-days-at-n-m-facility> [<https://perma.cc/4JEN-3X4U>].

43. *Family Detention: The Unjust Policy of Locking Up Immigrant Mothers With Their Children*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/family-detention> [<https://perma.cc/N8XB-DPVD>] (last visited June 20, 2018).

44. Alicia A. Caldwell, *U.S. to Close Immigrant Detention Center in Artesia*, SANTE FE NEW MEXICAN (Nov. 18, 2014), http://www.santafenewmexican.com/news/u-s-to-close-immigrant-detention-center-in-artesia/article_056a06ab-6044-5f04-950f-822b22779462.html [<https://perma.cc/8RS7-BXRC>].

45. *Background on Family Detention*, NAT'L IMMIGRANT JUST. CTR. (Jan. 2015), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Background%20on%20Family%20Detention.pdf> [<https://perma.cc/F7J5-P65A>]; see Julián Aguilar, *Immigration Detention Centers Will Continue Operating Despite Judge's Ruling*, TEX. TRIB. (Dec. 6, 2016, 5:00 PM), <https://www.texastribune.org/2016/12/06/immigration-detention-centers-will-continue-operat/> [<https://perma.cc/HQ9V-RNXJ>] (noting that the Karnes Family Residential Center has operated since August 2014).

In the first few months after the Artesia Family Detention Center opened, detained women and children were subjected to an expedited removal screening process where officers often quickly determined the detainee had no credible fear of persecution.⁴⁶ In July 2014, the first month the detention center was open and operational, only 40 percent of the women who underwent a credible fear interview at Artesia were able to establish a positive finding of credible fear.⁴⁷ By August 2014, when volunteer attorneys arrived at the detention center to represent women undergoing credible fear interviews, the interview pass rate doubled to 80 percent.⁴⁸ However, for many unrepresented women in Artesia who did not pass their credible fear interview, the damage was already done. Between June and October 2014, 306 of the 952 women and children processed by the Artesia Family Detention Center (approximately one-third) were deported.⁴⁹

For Central American unaccompanied minors, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) required that unaccompanied non-Mexican children who lacked authorization to enter the U.S. be transferred to the custody of the Office of Refugee Resettlement (ORR) (part of the Department of Health and Human Services) within seventy-two hours of apprehension.⁵⁰ After being transferred to ORR custody,

46. See Jude Joffe-Block, *Families That are Deported After Crossing the Border Say They Return Home Feeling Hopeless and Desperate*, PUB. RADIO INT'L (Sept. 4, 2014, 4:30 PM), <https://www.pri.org/stories/2014-09-04/families-are-deported-after-crossing-border-say-they-return-home-feeling-hopeless> [https://perma.cc/Y7X9-976U] (reporting that migrants “are held in detention and placed in expedited removal proceedings” and “must prove they have a credible fear of persecution”). Karen Tumlin, an attorney with the National Immigration Law Center, explained that at the Artesia Family Detention Center, there is a “rush to judgment to deport as many [of] these women and kids as quickly as possible.” *Id.*

47. U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC., FAMILY FACILITIES REASONABLE FEAR (Aug. 2016), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CF_RF_FamilyFacilitiesFY14_16Q2.pdf [https://perma.cc/8VTK-NT5G].

48. *Id.*

49. See Melinda Henneberger, *When an Immigration Detention Center Comes to a Small Town*, WASH. POST (Oct. 1, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/10/01/when-an-immigration-detention-center-comes-to-a-small-town/?utm_term=.c56e9e31a6bd [https://perma.cc/S2VV-FM7Z].

50. 8 U.S.C. § 1232(b)(3) (2013); OFF. REFUGEE RESETTLEMENT, U.S. DEPT. OF HEALTH & HUM. SERVS., UNACCOMPANIED ALIEN CHILDREN, <https://www.acf.hhs.gov/orr/programs/ucs> [https://perma.cc/PR8X-DN6Y] (last visited June 20, 2018).

unaccompanied minors are typically placed in a temporary shelter while ORR contracted caseworkers identify a sponsor—typically a parent, family member, or family friend residing in the U.S.—who can take custody of the unaccompanied minor while the minor goes through removal proceedings before an immigration judge.⁵¹ In the summer of 2014, citing a lack of existing resources to deal with the surge of unaccompanied minors at the border, ORR opened three large temporary facilities for unaccompanied minors on Lackland Air Force Base in San Antonio, Texas; Fort Sill Army Base in Oklahoma; and Port Hueneme Naval Base in Ventura, California.⁵²

While Central American unaccompanied minors were exempt from expedited removal proceedings and had more protections than adults and family units apprehended at the southern border in FY 2014, President Obama set the expectation that a majority of the unaccompanied minors would also be quickly returned, stating:

In recent weeks, we've seen a surge of unaccompanied children arrive at the border The journey is unbelievably dangerous for these kids. The children who are fortunate enough to survive it will be taken care of while they go through the legal process, but in most cases that process will lead to them being sent back home.⁵³

Although treatment of the different subgroups of Central Americans apprehended in FY 2014 slightly varied, each approach shared a common goal—swift removal and return of the recent Central American arrivals and deterrence of further migration from Central America.⁵⁴ However, as negative coverage of the Central

51. See generally OFF. OF REFUGEE RESETTLEMENT, U.S. DEPT. OF HEALTH & HUM. SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 2 (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2> [<https://perma.cc/Q3K7-C2VN>] (summarizing the timely release process of “children who are apprehended in the United States without a parent or legal guardian available to provide care and custody without immigration status”).

52. Sarah Bronstein, *Unaccompanied Children at Our Border: Why They Are Coming, What Happens Once They're Here and How to Help*, AM. CONST. SOC'Y BLOG (Aug. 15, 2014), <https://www.acslaw.org/acsblog/unaccompanied-children-at-our-border-why-they-are-coming-what-happens-once-they%E2%80%99re-here-and> [<https://perma.cc/C3BE-NVD3>].

53. Remarks on Immigration Reform 1, 2014 DAILY COMP. PRES. DOC. 504 (June 30, 2014).

54. See, e.g., Emily Bazelon, *Who Gets to Stay?*, SLATE (Sept. 12, 2014, 6:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/immig

American Migrant Crisis unfolded throughout the second half of FY 2014 and into FY 2015, the Obama Administration was forced to recalibrate its response to the crisis along the southern border.⁵⁵

3. *Media Coverage of the Central American Migrant Surge and Public Response*

When the Obama Administration rolled out its initial strategy for addressing the Central American Migrant Crisis, it was met with a corresponding surge in media coverage that was largely critical of the Administration's approach.⁵⁶ Between June 2014 and August 2014 alone, US media outlets published over 3,000 stories about Central American family detention, unaccompanied minors, and family units with children.⁵⁷ The initial coverage in June and July of

rants_seeking_asylum_courts_say_yes_for_domestic_violence_no_for_gang.html [https://perma.cc/LEQ9-F9LU] (chronicling the evolving treatment of victims of domestic violence as a migrant subgroup by the U.S. Board of Immigration Appeals); Lauren Carasik, *The American "Deportation Mill,"* BOSTON REV. (Sept. 9, 2014), <http://bostonreview.net/us/lauren-carasik-artesia-fletc-immigrant> [https://perma.cc/6HC7-6S44] (quoting U.S. Homeland Security Secretary Jeh Johnson saying, "Our message to [Central American migrants] is simple: we will send you back" and outlining the "Obama administration's aggressive deportation regime['s]" plan to process and deport immigrants within ten to fifteen days).

55. See, e.g., Sibylla Brodzinsky & Ed Pilkington, *US Government Deporting Central American Migrants to Their Deaths*, THE GUARDIAN (Oct. 12, 2015, 8:57 AM), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> [https://perma.cc/5BTF-A3U9]; Julie Hirschfeld Davis, *U.S. to Admit More Central American Refugees*, N.Y. TIMES (July 26, 2016), <https://www.nytimes.com/2016/07/27/us/politics/obama-refugees-central-america.html> [https://perma.cc/4Y2Y-8MU7] (reporting the Obama administration's broadening of rules was the result of "years of complaints from advocates for immigrants"); Michael Martinez et al., *Growing Protests Over Where to Shelter Immigrant Children Hits Arizona*, CNN (July 16, 2014), <http://www.cnn.com/2014/07/15/us/arizona-immigrant-children/index.html> [https://perma.cc/BGA5-YSQD].

56. See Abraham F. Lowenthal, *Obama and the Americas: Promise, Disappointment, Opportunity*, 89 FOREIGN AFF. 110, 115 (July/Aug. 2010), <https://docslide.net/documents/obama-and-the-americas-promise-dissappointment-opportunity.html/> [https://perma.cc/LK5J-JJWM] (discussing some media outlets' critical treatment of the Obama Administration's plan).

57. PROQUEST, <https://search.proquest.com/> (follow "Change Databases" hyperlink; then expand "Global Newsstream" and check only "US Newsstream"; then select "Use Selected Database"; then follow "Advanced Search" hyperlink; then type "Central America!" AND "Unaccompanied" OR "Family Detention" in the first text box (quotations included); then select from the "Publication date" dropdown

2014 largely focused on the large number of Central Americans apprehended and emergency resources deployed to the border⁵⁸ and the shortcomings of the Administration's response.⁵⁹

Much of the initial reporting criticizing the Administration focused on conditions at facilities holding unaccompanied children and family units with small children.⁶⁰ Many of these stories documented how unaccompanied children were being held in unsanitary and overcrowded facilities,⁶¹ in violation of the TVPRA requirement that children must be transferred to ORR custody within seventy-two hours of apprehension.⁶² Images of large crowds of young children packed into holding rooms at detention facilities, broadcasted nightly on cable news during the height of the surge, shocked Americans across the country.⁶³ Legal advocates also raised

"Specific date range..."; then enter the date range June 1, 2014–August 31, 2014; then select "Search" button) (last visited June 20, 2018).

58. See ADAM ISACSON ET AL., WASH. OFF. LATIN AMERICA, MEXICO'S OTHER BORDER: SECURITY, MIGRATION, AND THE HUMANITARIAN CRISIS AT THE LINE WITH CENTRAL AMERICA 3 (June 17, 2014), <https://www.wola.org/analysis/new-wola-report-on-mexicos-southern-border/> [<https://perma.cc/92R6-M7N2>].

59. See *id.*

60. See Benjamin Goad, *Groups Cite 'Horrific' Conditions at Immigrant Detention Center*, THE HILL, (July 24, 2014, 3:17 PM), <http://thehill.com/regulation/administration/213264-groups-cite-horrific-conditions-for-immigrant-detainees> [<https://perma.cc/54YY-26K2>]. See generally Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219 (2005) (offering background information about the plight of unaccompanied, undocumented alien children).

61. See Goad, *supra* note 60. See generally Nugent, *supra* note 60.

62. A number of news stories reported that unaccompanied minors were held by CBP and Border Patrol for days in short-term holding cells. See Ed Pilkington, *'It was Cold, Very Cold: Migrant Children Endure Border Patrol Ice Boxes'*, THE GUARDIAN, (Jan. 26, 2015, 7:00 AM), <https://www.theguardian.com/us-news/2015/jan/26/migrant-children-border-patrol-ice-boxes> [<https://perma.cc/L896-X98F>]; James Lyall, *"Welcome to Hell: The Border Patrol's Repeated Abuse of Children"*, HUFFINGTON POST BLOG (June 24, 2014, 10:45 PM), https://www.huffingtonpost.com/james-lyall/welcome-to-hell-the-borde_b_5527967.html [<https://perma.cc/C26F-7HC6>]. The holding cells were known for their cold temperatures (detainees referred to the holding cells as "hieleras," the Spanish word for ice box) and crowded, unsanitary conditions. See *id.*

63. Between May 1, 2014 and August 31, 2014, a search of three cable news networks showed MSNBC aired 113 stories, MSNBC, <http://www.msnbc.com/search/unaccompanied%20children> [<https://perma.cc/CWS6-T4FX>] (last visited June 20, 2018), Fox News aired 190 stories, FOX NEWS, http://www.foxnews.com/search-results/search?q=unaccompanied%20children&ss=fn&min_date=2014-05-01&max_date=2014-08-31&start=0 [<https://perma.cc/>

concerns about the conditions and lack of access to attorneys at the military bases in California, Texas, and Oklahoma that served as temporary shelters for unaccompanied minors.⁶⁴

By late July 2014, shortly after teams of volunteer attorneys arrived at the Artesia Family Detention Center, reports emerged that the family detention centers were “deportation mills.”⁶⁵ The reports asserted that the centers violated the due process rights of detainees and failed to adequately consider their asylum claims.⁶⁶ In addition to due process concerns, advocates also criticized the poor conditions at the Artesia facility, where women and children suffered physical and emotional harm due to their prolonged detention at the facility.⁶⁷ On August 22, 2014, shortly after these reports emerged, the American Civil Liberties Union (ACLU), American Immigration Council (AIC), National Immigration Project of the National Lawyers Guild (NLG), and the National Immigration Law Center (NILC) filed a class action suit on behalf of mothers detained at the Artesia facility.⁶⁸ The suit, *M.S.P.C. v. Johnson*,⁶⁹ alleged that the government violated mothers’ due process rights during initial asylum screenings and challenged the conditions at the Artesia facility.⁷⁰

The Obama Administration’s response to the migrant crisis also drew the ire of conservative media.⁷¹ Much of this coverage blamed

BA2T-WVRQ] (last visited June 20, 2018), and CNN aired 96 stories each discussing the surge of unaccompanied children at the border CNN, <http://www.cnn.com/search/?q=unaccompanied%20children&size=10&page=19&from=180&sort=newest> [https://perma.cc/2EQC-B2TB] (last visited June 20, 2018).

64. Bronstein, *supra* note 52.

65. See Henneberger, *supra* note 49.

66. See *id.*; see also Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), <https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html> [https://perma.cc/29SW-FXDL].

67. See Eleanor Acer, *Immigrant Families not Treated Properly*, ALBUQUERQUE J. (Aug. 3, 2014, 12:05 AM), <https://www.abqjournal.com/439865/immigrant-families-not-treated-properly.html> [https://perma.cc/3ACC-LBGM]; Goad, *supra* note 60.

68. Complaint for Injunctive & Declaratory Relief, *M.S.P.C. v. Johnson*, No. 1:14-cv-01437 (D.D.C. Aug. 22, 2014).

69. *M.S.P.C. v. Johnson*, No. 1:14-cv-01437 (D.D.C. Aug. 22, 2014).

70. Complaint for Injunctive & Declaratory Relief, *supra* note 68.

71. See, e.g., *Nebraska Gov, Illinois Senator Say White House Sending Illegal Immigrant Children to Their States Without Notice*, FOX NEWS (July 13, 2014),

the surge on President Obama's weak record on immigration and border security,⁷² and several Republican officials argued that the 2012 Deferred Action for Childhood Arrivals (DACA) program encouraged unaccompanied minors to come to the U.S. and seek amnesty.⁷³

Though the Obama Administration attempted to take tough and swift action to appease conservative critics before the 2014 midterm elections, in the end, neither conservatives nor liberals approved of President Obama's handling of the Central American Migrant Crisis. Conservatives viewed the rise in Central American apprehensions as reflective of President Obama's soft stance on border security and were not satisfied with the Administration's response.⁷⁴ Conversely, the expansion of family detention and lack of due process for Central Americans seeking asylum alienated President Obama's liberal base.⁷⁵ By July 2014, polling showed that the Obama Administration's approach to the crisis was widely unpopular, with 58 percent of respondents disapproving of President Obama's response to the border crisis.⁷⁶

<http://www.foxnews.com/politics/2014/07/13/nebraska-governor-illinois-senator-say-white-house-secretly-sending-illegal.html> [https://perma.cc/U8LM-4JQL].

72. See, e.g., Daily Caller, *ICE Ends Use of 'Alien' in Reference to Child Immigrants*, FOX NEWS (July 4, 2014), <http://www.foxnews.com/politics/2014/07/04/ice-ends-use-alien-in-references-to-child-immigrants.html> [https://perma.cc/D8TG-XJ7H].

73. See, e.g.,]; Molly Hennessy-Fiske & Richard Simon, *Republicans Blame Obama Policies for Immigration Crisis on Border*, L.A. TIMES (June 19, 2014), <http://beta.latimes.com/nation/la-na-immigration-border-20140620-story.html> [https://perma.cc/9RY5-YXT5]; Amanda Sakuma, *GOP Takes Border Crisis out on DREAMers*, MSNBC NEWS (July 21, 2014, 4:20 PM), <http://www.msnbc.com/msnbc/gop-takes-border-crisis-out-dreamers> [https://perma.cc/JZ3J-8FDZ].

74. According to a July 2014 CNN poll, the Central American Migrant Crisis quickly shifted public opinion toward a more hawkish view on immigration, particularly for Republicans, with over 75 percent of Republicans responding that the main focus of U.S. immigration policy should be "border security" versus "legal status for immigrants." See Paul Steinhauser, *CNN Poll: Border Crisis Impacting Public Opinion on Immigration*, CNN (July 24, 2014, 5:01 PM) <http://politicalticker.blogs.cnn.com/2014/07/24/cnn-poll-border-crisis-impacting-public-opinion-on-immigration/> [https://perma.cc/G9GN-E6PP].

75. Acer, *supra* note 67.

76. *Poor Marks for Obama and Republicans on Border Crisis*, WASH. POST. (July 15, 2014), https://www.washingtonpost.com/politics/polling/poor-marks-obama-republicans-border-crisis/2014/07/15/a10cb0be-0c0f-11e4-bc42-59a59e5f9e42_page.html [https://perma.cc/K43Y-HZ8T].

4. *Obama Administration's Evolving Position on Family Detention*

After the political failure of President Obama's initial response to the Central American migrant surge, legal challenges to family detention, and pressure from immigrant rights organizations and progressives, the Obama Administration eventually adopted a more humane approach toward the crisis. On September 5, 2014, several weeks after *M.S.P.C. v. Johnson* was filed in federal court, DHS sent a team of senior officials to monitor the situation in Artesia.⁷⁷ By mid-September, the Deputy Secretary of Homeland Security acknowledged the concerns and promised to quickly address any issues during the detainees asylum proceedings.⁷⁸

On November 18, 2014, two weeks after the 2014 midterm elections, U.S. Immigration and Customs Enforcement (ICE) announced that it would close the Artesia detention facility,⁷⁹ and on December 18, 2014, the facility closed.⁸⁰ While the suit and negative coverage did result in the closure of the Artesia detention facility, this did not mark the end of long-term family detention of Central American women and children.⁸¹ Instead, the women and children detained at Artesia were transferred to an even larger newly opened family detention facility in Dilley, Texas⁸² and long-term detention of Central American women and children continued into 2015.⁸³

On January 6, 2015, less than a month after the Artesia detention facility closed, the ACLU filed a second class action suit on behalf of detained mothers and children at the Karnes and Dilley

77. Plaintiffs' Notice of Voluntary Dismissal at 2, *M.S.P.C. v. Johnson*, No. 1:14-cv-01437-ABJ (D.D.C. Jan. 30, 2015).

78. *Id.* at 2–3.

79. Lauren Villagran, *Artesia Immigrant Detention Center Closes*, ALBUQUERQUE J. (Dec. 22, 2014), <http://www.abqjournal.com/516099/abqnewsseeker/artesia-immigrant-detention-center-closes.html> [<https://perma.cc/D359-CNNC>].

80. *Id.*

81. See, e.g., Claudia Morales, *Families Crossing the Border: 'We Are Not Criminals,'* CNN (Nov. 2, 2016, 1:13 PM), <http://www.cnn.com/2016/11/02/us/family-immigration-detention-centers/index.html> [<https://perma.cc/DA4U-GZHB>]; The Editorial Board, *Mr. Obama's Dubious Detention Centers*, N.Y. TIMES (July 18, 2016), <https://www.nytimes.com/2016/07/18/opinion/mr-obamas-dubious-detention-centers.html> [<https://perma.cc/3ER9-95GB>].

82. U.S. IMMIGR & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., ICE'S NEW FAMILY DETENTION CENTER IN DILLEY, TEXAS TO OPEN IN DECEMBER (Nov. 17, 2014), <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december> [<https://perma.cc/A74E-RMB3>].

83. *Id.*

family detention facilities: *R.I.L.R. v. Johnson*.⁸⁴ The ACLU brought this suit to challenge DHS's blanket "no-release" policy.⁸⁵ This policy involved detaining nearly all Central American asylum seekers who had passed their credible fear interview pending adjudication of their asylum claims.⁸⁶ The purpose of this policy was to deter future immigration to the United States from Central America.⁸⁷ On February 2, 2015, the ACLU filed a second action—on behalf of children being held in family detention facilities with their parents—to enforce the government's obligations under the 1997 *Flores v. Reno* settlement agreement governing the detention and release of immigrant children.⁸⁸

On February 20, 2015, the U.S. District Court for the District of Columbia issued a preliminary injunction prohibiting the government from using deterrence of future migration as the sole or primary basis for the DHS policy of detaining family units "while their asylum claims were [being] processed."⁸⁹ After this preliminary injunction, the DHS began making individualized determinations⁹⁰ concerning detainees' eligibility for release on parole or bond.⁹¹ On

84. Class Complaint for Injunctive and Declaratory Relief at 5, *R.I.L.R. v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015) (No. 1:15-cv-00011).

85. *Id.* at 3.

86. *Id.* at 2.

87. *Id.* at 1 ("DHS applies the No-Release Policy . . . in order to deter other Central American migrants from coming to the United States.").

88. The 1997 *Flores* Settlement Agreement set nationwide criteria for the detention, release, and treatment of immigrant children. *Family Detention & the Flores Settlement*, WOMEN'S REFUGEE COMM'N & LUTHERAN IMMIGRATION & REFUGEE SERVS. (2017), <https://www.womensrefugeecommission.org/images/zdocs/Flores-Settlement-and-Family-Detention-July-2015.pdf> [<https://perma.cc/QVJ2-S7WU>]. The Agreement requires government officials to release children from custody "without unnecessary delay" and to a parent or legal guardian, if possible. *Id.* If a minor cannot be released because of a significant public safety or flight risk concern, he or she must be held in the least restrictive setting, typically a non-secure facility licensed by a child welfare organization. *Id.* Plaintiffs filed a motion to enforce the *Flores* Settlement Agreement for children detained with a parent in a family detention facility and to prohibit children's long term detention in family detention centers. *Id.*

89. *R.I.L.R. v. Johnson*, 80 F. Supp. 3d 164, 190 (D.D.C. 2015).

90. See *ICE July 2015 Family Detention Announcement*, NAT'L IMMIGR. JUST. CTR. (July 13, 2015), <http://immigrantjustice.org/ice-july-2015-family-detention-announcement> [<https://perma.cc/B5YS-X8FB>] (describing the individualized approach "going forward" that ICE planned to utilize after abandoning the DHS's "general deterrence" policy).

91. See *R.I.L.R. v. Johnson*, ACLU (July 31, 2015), <https://www.aclu.org/>

May 13, 2015, in response to the district court's order and ongoing negative media coverage, ICE issued a statement announcing that the agency would no longer use deterrence of future migration as the basis for denying parole or bond to detained family units who had passed a credible fear interview.⁹² The May 2015 ICE statement also announced a series of measures aimed at improving conditions at the family detention centers and shortening the detention time for family units.⁹³

But these improvements did not come quickly enough for Democratic congressional leaders. On May 27, 2015, 136 Democratic members of the House of Representatives sent a letter to DHS Secretary Jeh Johnson expressing concerns about the continuing long-term detention of parents and children and demanding an end to long-term detention at family detention centers.⁹⁴ This was followed by a June 1, 2015, companion letter to Secretary Johnson, signed by 33 Senate Democrats.⁹⁵

After a year of negative coverage of the Central American Migrant Crisis, impact litigation challenging family detention, and vocal opposition within President Obama's own party, the Obama Administration decided to end long-term family detention.⁹⁶ On

cases/*rilr-v-johnson* [<https://perma.cc/MW2S-AW6T>] (“[ICE] issued a policy that it would not consider general deterrence in its detention decisions for families.”).

92. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., ICE ANNOUNCES ENHANCED OVERSIGHT FOR FAMILY RESIDENTIAL CENTERS (May 13, 2015), <https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers> [<https://perma.cc/4FWE-5CRQ>].

93. *Id.* (stating ICE's intention to “further enhance . . . conditions” at “family residential centers” and that “because of the sensitive and unique nature of detaining adults with children, ICE will also implement a review process for any families detained beyond 90 days, and every 60 days thereafter”).

94. Press Release, U.S. House of Representatives, 136 House Dems—Letter to DHS Sec. Johnson on Family/Child Detention (May 27, 2015), <https://lofgren.house.gov/news/documentsingle.aspx?DocumentID=397944> [<https://perma.cc/5AR7-VD5M>].

95. Letter from U.S. Senators to Jeh Johnson, Sec'y, Dep't of Homeland Sec. (June 1, 2015) <https://www.aclu.org/letter/us-senate-sign-letter-dhs-secretary-johnson-family-detention> [<https://perma.cc/4HEE-ZN2P>].

96. AM. IMMIGR. COUNCIL, A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES, AND RESPONSES 10 (June 26, 2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> [<https://perma.cc/L9Z2-77R9>] (“In 2014 and 2015, several detained families filed lawsuits to challenge various aspects of family detention.”); Tom Dart, *Child Migrants at Texas Border: An Immigration Crisis That's Hardly New*, THE GUARDIAN (July 9, 2014), <https://www.theguardian.com/world/2014/jul/09/us-immigration->

June 24, 2015, Secretary Johnson issued a statement announcing a dramatic shift in policy with respect to family detention, stating:

I have reached the conclusion that we must make substantial changes in our detention practices with respect to families with children. In short, once a family has established eligibility for asylum or other relief under our laws, long-term detention is an inefficient use of our resources and should be discontinued.⁹⁷

Under the new policy set forth by Secretary Johnson, families who established a credible fear of persecution were promptly released on bond or an alternative to detention (such as an ankle monitor)⁹⁸ pending adjudication of their asylum claim.⁹⁹ Secretary Johnson also directed DHS officials to complete credible fear interview screening for detained family units “within a reasonable timeframe” to ensure their prompt release.¹⁰⁰ A month later, Judge Dolly Gee of the U.S. District Court for the Central District of California issued a ruling that long-term detention of family units with minor children violated the *Flores* Settlement Agreement, codifying Secretary Johnson’s directive into a court order.¹⁰¹

undocumented-children-texas [https://perma.cc/2JWA-2D3K] (describing the “humanitarian crisis” of immigrants fleeing Central America and the “crowded . . . [and] unsanitary conditions” in family detention centers).

97. See Press Release, Dep’t of Homeland Sec., Statement by Sec’y Jeh Johnson on Family Residential Ctrs. (June 24, 2015), <https://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers> [https://perma.cc/9PTA-H7BX]. Secretary Johnson’s statement also noted that the Family Detention Center in Dilley, Texas, would remain open, but would only serve as a short-term processing center to complete credible fear screenings and to process families for release on parole or bond. *Id.*

98. LUTHERAN IMMIGR. & REFUGEE SERV., FAMILY DETENTION RELEASE AND PLACEMENT ALTERNATIVES: INITIAL REPORT ON LEARNING 2–6 (2016), http://lirs.org/wp-content/uploads/2016/04/LIRS_FPAInitialReport.pdf [https://perma.cc/8JAB-789D].

99. *Id.*

100. *Id.*

101. The 1997 *Flores* Settlement Agreement governs the minimum standards for the detention, release, and treatment of minors. Stipulated Settlement Agreement at 3, *Flores v. Reno*, CV 85-4544-RJK(Px) (C.D. Cal. 1997). Judge Gee, in the 2015 enforcement action, found that the family detention centers (Dilley, Texas; Karnes, Texas; and Berks, Pennsylvania) failed to meet such minimum standards. *Flores v. Johnson*, 212 F. Supp. 3d 864, 878 n.9 (C.D. Cal. 2015). The obligations set forth in this ruling require that detention of family units comply with the *Flores* settlement, and are subject to court order. See Holly Fuhrman, *The Flores Ruling and the Possible End to Family Detention*, HUM. RTS. FIRST (Aug. 3, 2015),

While issues do still arise,¹⁰² since June 2015, the vast majority of family units apprehended and held at a family detention center have undergone a credible fear screening and are released within twenty days of arrival, marking a drastic improvement from the initial response in the summer of 2014.¹⁰³

B. *Syrian Refugee Crisis and Response from the United States*

As the Central American Migrant Crisis was unfolding in 2014 and 2015, the world was facing a second humanitarian crisis in Syria.¹⁰⁴ In comparison to the Central American Migrant Crisis, President Obama's response in 2015 to the Syrian Refugee Crisis represented the values of his liberal base and clearly reflected lessons learned from the Central American Migrant Crisis.¹⁰⁵

<https://www.humanrightsfirst.org/blog/flores-ruling-and-possible-end-family-detention> [<https://perma.cc/JBQ2-7VR5>]; Julia Preston, *Judge Orders Release of Immigrant Children Detained by U.S.*, N.Y. TIMES (July 25, 2015), <https://www.nytimes.com/2015/07/26/us/detained-immigrant-children-judge-dolly-gee-ruling.html> [<https://perma.cc/H3KJ-QMNP>]. Further, unlike Secretary Johnson's directive, these obligations under the *Flores* settlement created by Judge Gee's July 2015 order are binding, and therefore cannot be reversed by subsequent Administrations.

102. Since early 2017, there have been several reports that DHS is considering separating family units apprehended at the border. *See generally infra* Part III.B.3.

103. *See generally* Valeria Gomez & Karla Mari McKanders, *Refugee Reception and Perception: U.S. Detention Camps & German Welcome Centers*, 40 FORDHAM INT'L L.J. 523, 538–39 (2017) (describing credible fear screening and release processes for family units detained at the Southern Family Residential Center in Dilley, Texas).

104. *See generally* Syria: *The Story of the Conflict*, BBC NEWS (Mar. 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868> [<https://perma.cc/F488-8ABU>] (outlining the events that transpired in Syria to create a crisis prior to early 2016).

105. *Compare* Laura Koran, *Obama: Refugee Crisis is Test of Our Humanity*, CNN (Sept. 20, 2016), <http://www.cnn.com/2016/09/20/politics/obama-refugees-summit/index.html> [<https://perma.cc/K7RW-3KU3>] (describing President Obama's impassioned call "to alleviate a global refugee crisis of epic proportions"), *with* Russell Berman, *The New Crackdown on Migrant Families*, ATLANTIC (Jan. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/01/the-obama-administrations-crackdown-on-central-american-migrants/422550/> [<https://perma.cc/CMH4-PXF7>] (noting one of the former President's critics as saying, "[The Obama Administration is] treating a [Central American] refugee crisis as an immigration enforcement issue").

1. *The Syrian Refugee Crisis – General Background*

The root of the Syrian Refugee Crisis can be traced to the Syrian Civil War, which began in 2011 as an uprising against the regime of Bashar al-Assad.¹⁰⁶ While the protests and uprising in Syria were initially viewed as a part of the Arab Spring that swept other Arab nations in early 2011, the Syrian uprising quickly descended into a bloody civil war.¹⁰⁷ By June 2013, two years into the civil war, the United Nations estimated that over 90,000 Syrians had been killed in the conflict.¹⁰⁸ Further complicating matters was the rise of the Islamic State of Iraq and Syria (ISIS) within Syria.¹⁰⁹ By 2014, ISIS seized control of significant portions of Syria.¹¹⁰

Between the violence of the civil war and the rise of ISIS, thousands of Syrians were forced to flee their homeland and seek refuge in the neighboring countries of Turkey, Lebanon, Egypt, Iraq, and Jordan.¹¹¹ By March 2013, the United Nations High Commissioner on Refugees (UNHCR) reported that one million Syrians had registered as refugees in neighboring countries.¹¹² Six months later, in September 2013, the total number of registered Syrian refugees doubled to two million.¹¹³ According to statistics

106. Kathy Gilsinan, *The Confused Person's Guide to the Syrian Civil War*, ATLANTIC (Oct. 15, 2015), <https://www.theatlantic.com/international/archive/2015/10/syrian-civil-war-guide-isis/410746/> [https://perma.cc/525L-2WK6].

107. *Id.*

108. *Nearly 93,000 People Killed in 'Vicious' Syria Conflict—UN Human Rights Chief*, U.N. NEWS CTR. (June 13, 2013), <http://www.un.org/apps/news/story.asp?NewsID=45162#.Wh8U3egrLIU> [https://perma.cc/3RS6-MUA7].

109. *See generally The Rise and Fall of ISIL Explained*, ALJAZEERA (June 20, 2017), <http://www.aljazeera.com/indepth/features/2017/06/rise-fall-isil-explained-170607085701484.html> [https://perma.cc/W3JV-2AL4] (providing a generalized history of ISIS's development and its current status as of mid-2017).

110. *See id.* ("By 2014, ISIL had taken Mosul from a defeated Iraqi army, as well as Raqqa and oil-rich Deir Az Zor in Syria.")

111. Mona Chalabi, *Syrian Refugees: How Many Are There and Where Are They?*, THE GUARDIAN (July 25, 2013, 2:30 AM), <https://www.theguardian.com/news/datablog/2013/jul/25/syrian-refugee-crisis-in-numbers-updated> [https://perma.cc/7UPV-A75B].

112. Adrian Edwards, ed. Leo Dobbs, *Number of Syrian Refugees Reaches 1 Million Mark*, UNHCR (Mar. 6, 2013), <http://www.unhcr.org/en-us/news/latest/2013/3/513625ed6/number-syrian-refugees-reaches-1-million-mark.html> [https://perma.cc/6RKK-QLJR].

113. Adrian Edwards, *Number of Syrian Refugees Tops 2 Million Mark with More on the Way*, UNHCR (Sept. 3, 2013), <http://www.unhcr.org/en-us/news/latest/2013/9/522495669/number-syrian-refugees-tops-2-million-mark-way.html> [https://perm

from the UNHCR, as of December 2017, there are approximately 5.4 million registered Syrian refugees worldwide.¹¹⁴

Given the high number of displaced Syrian refugees, the UNHCR, other NGOs, and the host countries had difficulty raising sufficient humanitarian funds to meet the basic needs of this refugee population.¹¹⁵ By 2014, there were widespread reports of malnutrition and disease, including cases of polio within Syrian refugee populations in Iraq and Lebanon.¹¹⁶ With resources spread thin, neighboring countries began to place limits on accepting new refugees.¹¹⁷ In October 2014, the New York Times reported that Jordan closed its borders to new Syrian refugees,¹¹⁸ and in January 2015, Lebanon implemented visa restrictions on new Syrian refugee arrivals.¹¹⁹

By late 2013, in response to the Syrian Refugee Crisis, a number of European Union countries made a commitment to accept a

a.cc/YQ7C:JPYX].

114. *Syria Regional Refugee Response: Inter-Agency Information Sharing Portal*, UNHCR, <http://data.unhcr.org/syrianrefugees/regional.php> [<https://perma.cc/DDD8-452T>] (last visited June 20, 2018).

115. See Chalabi, *supra* note 111 (stating that the UN has received only about 38 percent of the funds required to address the needs of refugees and NGOs has received a small fraction of the funding needed to meet needs on the ground, with the World Food Program only receiving 17 percent and the International Medical Corps only receiving 7 percent of required funds).

116. Sam Jones, *UN Brands Polio Outbreak in Syria and Iraq 'Most Challenging in History'*, THE GUARDIAN (Mar. 28, 2014, 3:00 PM), <https://www.theguardian.com/global-development/2014/mar/28/un-polio-syria-iraq-most-challenging-history> [<https://perma.cc/R7DS-WRUM>]; see *First Case of Polio Suspected Among Syrian Refugees in Lebanon*, NBC NEWS (Mar. 11, 2014, 10:53 AM), <https://www.nbcnews.com/storyline/syrias-children/first-case-polio-suspected-among-syrian-refugees-lebanon-n49811> [<https://perma.cc/7EQP-5N8C>].

117. Jack Redden, *UNHCR Says it is "Stretched to the Limit" by the Rising Number of Refugees*, UNHCR (Oct. 1, 2013), <http://www.unhcr.org/en-us/news/latest/2013/10/524ae6179/unhcr-says-stretched-limit-rising-number-refugees.html> [<https://perma.cc/RK7H-6RZL>] (quoting UN High Commissioner for Refugees António Guterres, stating "UNHCR and its partners are doing everything possible to respond, but we are stretched to the limits by this combination of an emergency unparalleled in the recent past, and the persistence of other crises around the world").

118. Rana F. Sweis, *No Syrians Are Allowed into Jordan, Agencies Say*, N.Y. TIMES (Oct. 8, 2014), <https://www.nytimes.com/2014/10/09/world/middleeast/syrian-refugees-jordan-border-united-nations.html> [<https://perma.cc/PW7S-M5VD>].

119. *Syrians Entering Lebanon Face New Restrictions*, BBC NEWS (Jan. 5, 2015), <http://www.bbc.com/news/world-middle-east-30657003> [<https://perma.cc/HHZ5-8DD2>].

limited number of Syrian refugees for resettlement.¹²⁰ Germany led this effort, committing to accept 5,000 refugees in 2013.¹²¹

Because of deteriorating conditions in refugee camps and the news that Western European nations were willing to accept Syrian refugees, many displaced Syrians, along with other migrants from Afghanistan and sub-Saharan Africa, began crossing the Mediterranean by boat to seek asylum in Europe.¹²² By the end of 2014, the situation had reached a crisis point: over 280,000 migrants, including nearly 80,000 Syrians, entered the Euro Zone without authorization,¹²³ with 77 percent of these migrants entering by sea.¹²⁴

Although the U.S. did commit significant foreign humanitarian aid to address the refugee crisis¹²⁵ and provided military aid to combat ISIS in Syria,¹²⁶ the United States' initial commitment to resettle Syrian refugees was relatively modest compared to its European counterparts.¹²⁷ Between FY 2013 and FY 2015, the U.S. resettled a total of 1,873 Syrian refugees.¹²⁸ But with one shocking

120. Divers, *First Group of Syrian Refugees Flies to Germany*, UNHCR (Sept. 11, 2013), <http://www.unhcr.org/en-us/news/latest/2013/9/523076919/first-group-syrian-refugees-flies-germany.html> [<https://perma.cc/LN67-SA62>].

121. *Id.*

122. Patrick Kingsley, *Desperate Syrian Refugees Risk All in Bid to Reach Europe*, THE GUARDIAN (Sept. 18, 2014, 2:00 PM), <https://www.theguardian.com/global-development/2014/sep/18/desperate-syrian-refugees-europe-mediterranean> [<https://perma.cc/484N-RLP6>].

123. FRONTEX, ANNUAL RISK ANALYSIS 2015, at 59 (2015), http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf [<https://perma.cc/X4JB-DBUY>].

124. *Id.* at 18. (explaining that there were 219,476 detected migrants crossing by sea and a total of 283,532 illegal border crossing in 2014).

125. See generally U.S. DEP'T OF STATE, U.S. HUMANITARIAN ASSISTANCE IN RESPONSE TO THE SYRIAN CRISIS (Apr. 5, 2017), <https://www.state.gov/j/prm/releases/factsheets/2017/269469.htm> [<https://perma.cc/WD27-NJTD>].

126. *Syria Crisis: Where Key Countries Stand*, BBC NEWS (Oct. 30, 2015), <http://www.bbc.com/news/world-middle-east-23849587> [<https://perma.cc/LZ7Z-TWB4>].

127. Nicole Ostrand, *The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States*, 3 J. ON MIGRATION & HUM. SEC. 255, 270 (2015) (detailing the number of Syrian asylum applications and acceptance by country).

128. OFF. REFUGEE SETTLEMENT, U.S. DEPT. HEALTH & HUMAN SERVS., FY 2015 SERVED POPULATIONS BY STATE AND COUNTRY OF ORIGIN (REFUGEES ONLY) (Apr. 22, 2016), <https://www.acf.hhs.gov/orr/resource/fy-2015-refugees-by-state-and-country-of-origin-all-served-populations> [<https://perma.cc/M8RZ-4KPU>] (pr-

photo, the Syrian Refugee Crisis gripped the American public, resulting in the Obama Administration taking swift action in support of admitting more Syrian refugees into the U.S.

2. *Media Coverage of Syrian Refugee Crisis and Response from the United States*

As the Syrian Refugee Crisis unfolded between 2012 and 2015, there was considerable worldwide coverage of this emerging humanitarian crisis. In 2014, there were 17,256 stories in the international press covering the Syrian Refugee Crisis.¹²⁹ By comparison, during the same period, only 7,560 stories covering the Syrian Refugee Crisis appeared in the American press in 2014,¹³⁰ and approximately 30 percent of 2014 U.S. coverage of the Syrian Refugee Crisis focused, in part, on U.S. military efforts against ISIS in Syria.¹³¹

providing ORR statistics showing a total of 1,693 refugees from Syrian were resettled in the U.S. in FY 2015); OFF. OF REFUGEE SETTLEMENT, U.S. DEPT. OF HEALTH & HUMAN SERVS., FISCAL YEAR 2013 REFUGEE ARRIVALS (Feb. 11, 2015), <https://www.acf.hhs.gov/orr/resource/fiscal-year-2013-refugee-arrivals> [<https://perma.cc/T3ES-22YJ>] (providing ORR statistics showing a total of forty-eight refugees from Syrian were resettled in the U.S. in FY 2013); OFFICE REFUGEE SETTLEMENT, U.S. DEPT. HEALTH & HUMAN SERVS., FISCAL YEAR 2014 REFUGEE ARRIVALS (Feb. 11, 2015), <https://www.acf.hhs.gov/orr/resource/fiscal-year-2014-refugee-arrivals> [<https://perma.cc/3ETT-EQKW>] (providing ORR statistics showing a total of 132 refugees from Syrian were resettled in the U.S. in FY 2014).

129. PROQUEST, <https://search.proquest.com/> (follow “Change Databases” hyperlink; then expand “Global Newsstream” and check only “Canadian Newsstream,” and “Global Breaking Newswires,” and “International Newsstream”; then select “Use Selected Databases”; then follow “Advanced Search” hyperlink; then type “Syria” AND “Refugee” in the first text box (quotations not included); then select from the “Publication date” dropdown “Specific date range...”; then enter the date range January 1, 2014–December 31, 2014; then select “Search” button) (last visited June 20, 2018).

130. *Id.* (follow “Change Databases” hyperlink; then expand “Global Newsstream” and check only “US Newsstream”; then select “Use Selected Database”; then follow “Advanced Search” hyperlink; then type “Syria” and “Refugee” in the first text box (quotations not included); then select from the “Publication date” dropdown “Specific date range...”; then enter the date range January 1, 2014–December 31, 2014; then select “Search” button) (last visited June 20, 2018).

131. *See id.* (click on “publications”; then check only “US Newsstream” database; then click “Advanced Search”; then enter search terms “Syria” AND “Refugee” and “ISIS” (quotations not included); then select from the “Publication Date” dropdown, “Specific date range. . .”; then enter the date range January 1, 2014–December 31, 2014) (last visited June 20, 2018) (finding that after searching “ISIS”

On September 2, 2015, the U.S. public swiftly turned its attention to the Syrian Refugee Crisis when an image of a drowned toddler—Alan Kurdi, washed up on the shore near Bodrum, Turkey—was circulated by the media.¹³² The photo of Kurdi's lifeless body immediately went viral after it was tweeted by Peter Bouckaert, Emergencies Director at Human Rights Watch,¹³³ quickly becoming the global symbol of the Syrian Refugee Crisis. In explaining why he shared the photo on social media, Bouckaert touched on why the image was so powerful, stating:

What struck me the most were his little sneakers, certainly lovingly put on by his parents that morning as they dressed him for their dangerous journey. One of my favorite moments of the morning is dressing my kids and helping them put on their shoes. They always seem to manage to put something on backwards, to our mutual amusement. Staring at the image, I couldn't help imagine that it was one of my own sons lying there drowned on the beach.¹³⁴

After the image of Alan Kurdi went viral, coverage of the Syrian Refugee Crisis surged throughout the United States. Between September 2, 2015—the day Bouckaert discovered Kurdi's body on the Turkish shore—and September 10, 2015, United States news sources published 1,656 stories about the Syrian Refugee Crisis.¹³⁵ By way of comparison, in the nine day period prior to the publication

within the data set of the 7,560 of U.S. articles published on the Syrian Refugee Crisis in 2014, 2,167 also discuss ISIS).

132. Olivier Laurent, *What the Image of Aylan Kurdi Says About the Power of Photography*, TIME (Sept. 4, 2015), <http://time.com/4022765/aylan-kurdi-photo/> [<https://perma.cc/X6CJ-K4GA>] (“As [the images of Aylan Kurdi's body] spread, and as individuals and organizations faced the decision of whether and how to publish them, those pictures have ignited a new kind of conversation about the crisis.”).

133. Peter Bouckaert (@Bouckap), TWITTER (Sept. 2, 2015, 4:29 AM), <https://twitter.com/bouckap/status/639037338362978304> [<https://perma.cc/F86E-JBXJ>].

134. Peter Bouckaert, *Dispatches: Why I Shared a Horrific Photo of a Drowned Syrian Child*, HUM. RTS. WATCH (Sept. 2, 2015), <https://www.hrw.org/news/2015/09/02/dispatches-why-i-shared-horrific-photo-drowned-syrian-child> [<https://perma.cc/9AQ9-MUEW>].

135. PROQUEST, <https://search.proquest.com/> (click on “publications”; then check only “US Newsstream” database; then click “Advanced Search”; then enter search terms “Syria” AND “Refugee” (quotations not included); then select from the “Publication Date” dropdown, “Specific date range. . .”; then enter the date range September 2, 2015–September 10, 2015) (last visited June 20, 2018).

of the photo of Alan Kurdi—from August 24, 2015 to September 1, 2015—only 500 stories appeared in the United States press about the Syrian Refugee Crisis.¹³⁶

The image appeared to quickly sway the United States public in favor of helping Syrian refugees. In a CNN poll taken between September 4, 2015, and September 8, 2015, 55 percent of respondents were in favor of accepting Syrian refugees, and 83 percent of respondents were in favor of providing humanitarian aid to refugees.¹³⁷ Public engagement in support of refugees also spiked in the days immediately after the photo of Alan Kurdi went viral. During the week of September 14, 2015, Syrian-American Activist George Batah delivered a change.org petition, signed by 330,000 Americans, to the White House demanding the U.S. resettle 65,000 Syrian refugees in FY 2016.¹³⁸

In contrast to the Administration's response to the Central American Migrant Crisis a year earlier, President Obama responded to the groundswell of media coverage and public support for Syrian refugees with decisive action. On September 10, 2015, eight days after the photo of Alan Kurdi was published around the world, the Obama Administration announced its commitment to resettle a minimum of 10,000 Syrian refugees in the coming year.¹³⁹ Later in the month, on September 21, 2015, the U.S. Department of State announced that it was providing an additional \$419 million in humanitarian aid to assist Syrian refugees in neighboring countries

136. *Id.* (click on “publications”; then check only “US Newsstream” database; then click “Advanced Search”; then enter search terms “Syria” AND “Refugee” (quotations not included); then select from the “Publication Date” dropdown, “Specific date range. . .”; then enter the date range August 24, 2015–September 1, 2015) (last visited June 20, 2018).

137. *CNN/ORC Poll: Full Results on Migrant Crisis*, CNN (Sept. 14, 2015, 1:16 PM), <http://www.cnn.com/2015/09/14/politics/migrant-crisis-refugees-poll-cnn-orc/index.html> [<https://perma.cc/56WU-YGTE>].

138. Amanda Terkel, *Man Who Started Syrian Refugee Petition Invited to the White House*, HUFFINGTON POST (Oct. 15, 2015, 4:37 PM), https://www.huffingtonpost.com/entry/george-batah-syriapetition_us_561feeae4b050c6c4a4c76d [<https://perma.cc/5MA5-N7G6>]; *White House Asked to Help Syrian Refugees*, CNN (Sept. 16, 2015), <http://www.cnn.com/videos/world/2015/09/16/exp-syrian-refugee-crisis.cnn> [<https://perma.cc/Y4BB-4NSH>].

139. *See* Remarks at the Leaders Summit on Refugees in New York City, 2016 DAILY COMP. PRES. DOC. 616 (Sept. 20, 2016); Gardiner Harris et al., *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. TIMES (Sept. 10, 2015), <https://www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html> [<https://perma.cc/HF5M-4TFA>].

displaced by the conflict.¹⁴⁰ Following up on his commitment to resettle 10,000 Syrian refugees in 2016, President Obama formally raised the annual refugee ceiling from 70,000 to 85,000 for FY 2016 on October 1, 2015.¹⁴¹

Nonetheless, the Obama Administration faced some opposition to increased resettlement of Syrian refugees, particularly after the terrorist attack in Paris on November 13, 2015.¹⁴² In the wake of the Paris attack, thirty governors called on the Administration to halt the resettlement of Syrian refugees,¹⁴³ and then-presidential candidate Donald Trump called for surveillance of mosques and possible creation of a Muslim registry.¹⁴⁴ Yet, President Obama's commitment to resettle Syrian refugees and increase refugee admissions did not waver—the Obama Administration exceeded its initial goal and resettled 12,587 Syrian refugees in FY 2016.¹⁴⁵ In FY 2017, President Obama raised the ceiling on refugee arrivals to 110,000,¹⁴⁶ marking

140. Carol Morello, *U.S. Gives \$419 Million More to Aid Syrian Refugees*, WASH. POST. (Sept. 21, 2015), https://www.washingtonpost.com/world/national-security/us-gives-419-million-more-to-aid-syrian-refugees/2015/09/21/7f0157c6-607e-11e5-8e9e-dce8a2a2a679_story.html?utm_term=.070587639e79 [<https://perma.cc/QFE3-E2JH>].

141. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Bureau of Population, Refugees & Migration, Proposed Refugee Admissions for Fiscal Year 2016, at 5 (Oct. 1, 2015), <https://www.state.gov/documents/organization/247982.pdf> [<https://perma.cc/JJG8-9GDY>].

142. See, e.g., *More States Say No to Syrian Refugees After Paris Attacks*, CBS NEWS (Nov. 16, 2015), <https://www.cbsnews.com/news/more-states-say-no-to-syrian-refugees-after-paris-attacks/> [<https://perma.cc/Y3U9-M74R>].

143. In the wake of the November 13, 2015, terrorist attack in Paris, twenty-nine Republican Governors and one Democratic Governor (Maggie Hassan of New Hampshire) publicly called on President Obama to halt plans to resettle Syrian refugees. See Arnie Seipel, *30 Governors Call for Halt to U.S. Resettlement of Syrian Refugees*, NPR NEWS (Nov. 17, 2015), <https://www.npr.org/2015/11/17/456336432/more-governors-oppose-u-s-resettlement-of-syrian-refugees> [<https://perma.cc/T33M-3E3K>].

144. Maggie Haberman & Richard Perez-Pena, *Donald Trump Sets Off a Furor with Call to Register Muslims in the U.S.*, N.Y. TIMES (Nov. 20, 2015), <https://www.nytimes.com/2015/11/21/us/politics/donald-trump-sets-off-a-furor-with-call-to-register-muslims-in-the-us.html> [<https://perma.cc/6GEQ-SD2N>].

145. Jie Zong & Jeanne Batalova, *Syrian Refugees in the United States*, MIGRATION POLY INST. (Jan. 12, 2017), <https://www.migrationpolicy.org/article/syrian-refugees-united-states> [<https://perma.cc/XAP2-XNAP>].

146. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., BUREAU OF POPULATION, REFUGEES & MIGRATION, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2017, at 5 (Sept. 15, 2016), <https://www.state.gov/documents/organization/262168.pdf> [<https://perma.cc/5K4Y-HNSV>].

the first time the refugee ceiling was raised above 100,000 in over twenty years.¹⁴⁷

In the end, President Obama's September 2015 decision to increase Syrian refugee resettlement in response to media coverage and public engagement was politically popular.¹⁴⁸ By the summer of 2016, polling showed a majority of Americans, including an overwhelming majority of Democrats, supported refugee resettlement.¹⁴⁹

III. EXECUTIVE ACTIONS BY THE TRUMP ADMINISTRATION IMPACTING ASYLUM SEEKERS AT THE BORDER AND SYRIAN REFUGEES

Unlike President Obama, a more traditional politician whose executive decisions on immigration policy could be swayed by media coverage and public opinion, President Trump's positions on immigration have not materially changed since the 2016 presidential campaign.¹⁵⁰

After running on a platform of restrictionist immigration policy, President Trump began his first week in office by issuing three executive orders on immigration: the "Border Security and Immigration Enforcement Improvements" Executive Order ("Border Security Executive Order") on January 25, 2017;¹⁵¹ the "Enhancing Public Safety in the Interior of the United States" Executive Order on January 25, 2017;¹⁵² and the "Protecting the

147. See *U.S. Annual Refugee Resettlement Ceilings & Number of Refugees Admitted, 1980-Present*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/us-annual-refugee-resettlement-ceilings-and-number-refugees-admitted-united> [<https://perma.cc/93W4-NUXV>] (last visited June 20, 2018).

148. See, e.g., Juana Summers, *Survey: Partisan Split Over U.S. Taking in Refugees*, CNN (June 13, 2016, 11:48 AM), <http://www.cnn.com/2016/06/13/politics/syrian-refugees-poll-american-attitudes/index.html> [<https://perma.cc/M2TW-NTGX>] (citing a Brookings Institution survey indicating that 59% of Americans supported accepting refugees, including 77% of Democrats).

149. See *id.* (describing that in a June 2016 CNN poll, 58 percent of respondents, including 77 percent of Democrats, supported refugee resettlement).

150. See Stephen Collinson and Jeremy Diamond, *Trump on Immigration: No Amnesty, No Pivot*, CNN: POLITICS (Sept. 1, 2016), <http://www.cnn.com/2016/08/31/politics/donald-trump-immigration-speech/index.html> [<https://perma.cc/56WM-KJW5>]; *Immigration*, WHITE HOUSE.GOV, www.whitehouse.gov/issues/immigration/ [<https://perma.cc/E2WG-2JXX>] (last visited June 20, 2018).

151. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

152. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

Nation from Foreign Terrorist Entry Into the United States” Executive Order on January 27, 2017 (“Travel Ban”).¹⁵³

Since issuing these executive orders in late January 2017, President Trump’s positions on the travel ban and border security have not been swayed by negative media coverage. Because of this, the role of the media has shifted to informing the public about the Trump Administration’s actions on immigration, spurring change through impact litigation and legal advocacy challenging those actions.¹⁵⁴

By signing the Travel Ban and the Border Security Executive Order during his first week in office, President Trump immediately made good on his campaign promises and set forth immigration policies far more restrictionist than any of his predecessors.¹⁵⁵ Both of these executive orders had an immediate impact on Syrian refugees and Central American asylum seekers, but only the Travel Ban was quickly halted through litigation.¹⁵⁶ As a contrast to Part II, which examined how media coverage swayed immigration policy during the Obama Administration, Part III examines the Trump Administration’s executive action impacting Syrian refugees and Central American asylum seekers and how the disparate level of media coverage and corresponding impact litigation has affected President Trump’s ability to implement these actions.

153. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

154. See, e.g., Matthew Cooper, *The Anti-Trump Resistance: Lawyers Lead the Fight Against the White House*, NEWSWEEK (Feb. 10, 2017, 1:06 PM), <http://www.newsweek.com/trump-travel-immigration-ban-muslims-supreme-court-san-francisco-9th-circuit-555203> [<https://perma.cc/RC9A-98MJ>]; Nick Miroff & David Nakamura, *200,000 Salvadorans May be Forced to Leave the U.S. as Trump Ends Immigration Protection*, WASH. POST (Jan. 8, 2018, 7:03 PM), https://www.washingtonpost.com/world/national-security/trump-administration-to-end-provisional-residency-for-200000salvadorans/2018/01/08/badfde90-f481-11e7-beb6-c8d48830c54d_story.html?utm_term=.99661c226f26 [<https://perma.cc/J6YE-YQV3>].

155. See, e.g., Cynthia Farrar, *What Donald Trump Doesn’t Get About His Own Immigration Story*, POLITICO (Oct. 26, 2016), <https://www.politico.com/magazine/story/2016/10/donald-trump-immigration-story-video-214389> [<https://perma.cc/AM6E-X4VM>]; Summer Meza, *Trump’s Election Promises, Both Broken and Kept*, NEWSWEEK (Nov. 8, 2017, 8:10 AM), <http://www.newsweek.com/trump-one-year-election-promises-kept-and-broken-704862> [<https://perma.cc/V8AU-L5RF>].

156. See, e.g., Jaweed Kaleem, *Trump’s Travel Ban Could Remain Blocked for Weeks*, L.A. TIMES (Mar. 23, 2017, 5:21 PM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-s-travel-ban-could-remain-blocked-1490313567-htmistory.html> [<http://perm a.cc/QL6T-UCU8>] (discussing the litigation stalling the travel ban).

A. *Travel Ban Executive Order*

One week after his inauguration, President Trump ignited a firestorm when he signed the first in a series of Travel Ban Executive Orders banning the admission of refugees and nationals of seven Muslim majority countries.¹⁵⁷ The initial thirty-six hours after the first Travel Ban was issued saw chaos at our nation's airports,¹⁵⁸ ultimately resulting in the first in a series of nationwide injunctions halting its implementation.¹⁵⁹

157. *E.g.*, *Trump Travel Ban Sparks Protests at Airports Nationwide*, CBS NEWS (Jan. 29, 2017), <https://www.cbsnews.com/news/donald-trump-travel-ban-sparks-protests-at-airports-nationwide-seattle-tacoma/> [<https://perma.cc/6M55-PX8W>] (covering just some of the domestic protests over the Executive Order, including those in Seattle, New York, Newark, Chicago, Denver, Dallas, Portland, San Francisco, San Diego, and Fairfax); Reena Flores, *How Foreign Leaders Are Reacting to Trump's Travel Ban*, CBS NEWS (Jan. 28, 2017), <https://www.cbsnews.com/news/how-foreign-leaders-are-reacting-to-trumps-travel-ban/> [<https://perma.cc/YQ7Z-4L8A>] (detailing the international criticism that the ban drew including from such divergent countries as Iran and France).

158. *See* Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html> [<https://perma.cc/KHQ8-AFMR>] (noting the efforts of attorneys and legal aid groups to offer advice to individuals effected); Glenn Kessler, *The Number of People Affected by the Trump Travel Ban: About 90,000*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000/?utm_term=.4c12ba04f8b9 [<https://perma.cc/LVL3-3KUK>] (looking at the lack of clarity provided for implementation with the hasty reversal by the White House regarding the status of entry for green card holders); Eonghan MacGuire et al., *Trump Travel Restrictions Leave Refugees Stranded: Reports*, NBC NEWS (Jan. 28, 2017), <https://www.nbcnews.com/news/world/trump-travel-restrictions-leave-refugees-stranded-reports-n713591> [<https://perma.cc/EPJ4-9LWK>] (highlighting the challenges faced U.S. Customs officials due to the hasty implementation, which lead to detentions of peoples all ready in flight at the time of its signing).

159. *See generally* Ben Jacobs, *US Travel Ban Hits Major Setback as Judges Uphold Temporary Restraining Order*, THE GUARDIAN (Feb. 10, 2017), <https://www.theguardian.com/us-news/2017/feb/09/judges-deny-trump-travel-ban-enforcement-uphold-order> [<https://perma.cc/SJW3-PJ75>] (highlighting the Ninth Circuit's sustainment of the injunction arising from challenges by Washington and Minnesota); Rachel Weiner, *Federal Judge in Virginia Issues Strong Rebuke of Trump Travel Ban*, WASH. POST (Feb. 14, 2017), https://www.washingtonpost.com/local/public-safety/judge-in-virginia-grants-preliminary-injunction-against-travelban/2017/02/13/a6164bfe-f255-11e6-a9b0-ecee7ce475fc_story.html?utm_term=.9e6f7b00d53 [<https://perma.cc/462E-5JTV>] (reviewing an Eastern District of Virginia's injunction order and specifically drawing emphasis to the court's conclusion that the Executive Order likely violated the

After the first Travel Ban was effectively blocked by the courts, the Trump Administration opted to issue a revised, slightly more tailored version of the Travel Ban on March 6, 2017.¹⁶⁰ The second version of the Travel Ban was also challenged in federal court, and was eventually appealed to the U.S. Supreme Court,¹⁶¹ where the case was dismissed when the March 6 order expired.¹⁶² A third indefinite version of the Travel Ban, issued as a Presidential Proclamation on September 28, 2017,¹⁶³ was allowed to move forward on December 4, 2017, when the U.S. Supreme Court issued an unsigned order lifting two nationwide preliminary injunctions issued by the Fourth Circuit and Ninth Circuit Court of Appeals.¹⁶⁴ Litigation challenging the legality of the third Travel Ban is currently pending before the U.S. Supreme Court.¹⁶⁵

Establishment Clause).

160. The second version of the Travel Ban applied to nationals of six countries: Libya, Sudan, Iran, Somalia, Yemen and Syria. Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017). Iraq, included in the original Travel Ban, was removed from the list of prohibited countries. *Id.* The second version of the Travel Ban also specifically exempted lawful permanent residents, individuals who were admitted or paroled into the U.S., individuals who had been issued a visa prior to the effective date of the order, dual nationals who are citizens of a non-banned country, diplomats, and previously admitted refugees and asylees. *Id.*

161. On June 26, 2017, the U.S. Supreme Court granted certiorari on the two lead cases challenging the second version of the Travel Ban. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2086–89 (2017), *cert. granted*, 85 U.S.L.W. 4477 (U.S. June 26, 2017) (Nos. 16-1436 (16A1190) & 16-1540 (16A1191)) (consolidating two cases: *Hawaii v. Trump* from the Ninth Circuit and *Trump v. Int'l Refugee Assistance Project* from the Fourth Circuit). The Court also granted a stay that partially lifted the nationwide injunctions issued by the Fourth Circuit and Ninth Circuit Court of Appeals. *Id.* at 2089. In granting the partial stay, the Court permitted the second Travel Ban to be enforced against individuals from the six countries who lacked a qualifying bona fide relationship with a U.S. citizen, permanent resident, or U.S. entity. *Id.* at 2087–89.

162. *See Trump v. Hawaii*, 138 S. Ct. 377 (2017).

163. The third version of the Travel Ban contained the same exemptions as the second version of the Travel Ban but varied from the second version in several respects. *See generally* Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017). The third version of the Travel Ban applied to six Muslim-majority countries—Iran, Libya, Yemen, Somalia, Chad and Syria—and two non-Muslim majority countries—North Korea and certain officials from Venezuela. *See id.* at 3. Additionally, the third version of the Travel Ban was indefinite in nature. *See generally id.*

164. *See Trump v. Hawaii*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/trump-v-hawaii-3/> [https://perma.cc/Y8BE-G8YW] (last visited June 20, 2018).

165. *See id.*

Yet, the summary above is not the complete story, particularly in the case of the first version of the Travel Ban. In addition to the litigation challenging that version of the Travel Ban, there were a number of external factors (including media coverage, public engagement, and legal advocacy) that shaped its failed rollout. The sections below will examine the role of the media and the public in impact litigation challenging the first Travel Ban. Further, they will discuss the necessity of continued public engagement as litigation challenging later versions of the Travel Ban makes its way through the courts.

1. *Impact on Syrian Refugees*

On Friday, January 27, 2017, President Trump signed the first Travel Ban Executive Order.¹⁶⁶ The first version of the Travel Ban had an immediate, adverse impact on Syrian refugees, effectively reversing President Obama's commitment to increase Syrian refugee resettlement.¹⁶⁷ In particular, two sections of the Travel Ban specifically targeted Syrian refugees and other Syrian nationals inside and outside of the United States.¹⁶⁸ First, section 3(c) banned the admission of nationals from seven countries, including Syria, in immigrant and nonimmigrant status for a period of ninety days.¹⁶⁹ Additionally, section 5 banned the admission of all refugees for a period of 120 days, reduced the annual ceiling of refugee admissions to 50,000, and banned the admission of Syrian refugees until sufficient changes were made to the U.S. Refugee Admissions Program to "ensure that admission of Syrian refugees [was] consistent with the national interest,"¹⁷⁰ effectively creating an indefinite ban on Syrian refugees.

166. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

167. *See id.* at 8978–80.

168. *Id.*

169. *Id.* at 8978. Under the Immigration and Nationality Act (INA), "Immigrants" refer to non-citizens holding status that allows them to stay in the U.S. indefinitely, and "Nonimmigrants" refer to non-citizens admitted to the U.S. with a visa that permits them to stay for a temporary period of time pursuant to the terms of their visa. *See* INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (Supp. 2017).

170. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8979–80 (Jan. 30, 2017).

2. *Implementation of the Travel Ban Executive Order and Resulting Media Coverage*

The Travel Ban Executive Order went into effect immediately after President Trump signed it on the afternoon of Friday, January 27, 2017, and airports across the country quickly descended into chaos. According to a New York Times article, by the evening of Saturday, January 28, 2017, 109 travelers in transit to the U.S. were denied admission in the hours after the Travel Ban was signed.¹⁷¹ Meanwhile, 173 travelers were stopped before being allowed to board planes to the U.S.¹⁷² Other travelers, including lawful permanent residents, were detained for hours at airports across the nation as Customs and Border Protection (CBP) officials attempted to sort out proper procedures to enforce the Travel Ban.¹⁷³ In response, there were a number of protests at airports across the country as hundreds of Americans demonstrated against the ban.¹⁷⁴ Additionally, teams of volunteer attorneys descended on airports to assist travelers impacted by the Travel Ban.¹⁷⁵

By Saturday evening, the ACLU, along with the International Refugee Assistance Project (IRAP), the NILC, and Yale Law School's Jerome N. Frank Legal Services Organization filed a suit in the Eastern District of New York on behalf of two impacted travelers.¹⁷⁶ The suit, *Darweesh v. Trump*, challenged the legality of the Travel Ban

171. Michael D. Shear et al., *Judge Blocks Trump Order*, N.Y. TIMES (Jan. 28, 2017) [hereinafter Shear et al., *Judge Blocks Trump Order*], <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html> [https://perma.cc/L8Y9-7GHN].

172. *Id.*

173. See Jonathan Allen & Brendan O'Brian, *How Trump's Abrupt Immigration Ban Sowed Confusion at Airports, Agencies*, REUTERS (Jan. 29, 2017, 12:25 AM), <https://www.reuters.com/article/us-usa-trump-immigration-confusion/how-trump-abrupt-immigration-ban-sowed-confusion-at-airports-agenciesidUSKBN15D07S> [https://perma.cc/M7AP-XTFB]; Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> [https://perma.cc/5WWH-9C2Q]; Matt Stevens, *First Travel Ban Order Left Officials Confused, Documents Show*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/us/trump-travel-ban.html> [https://perma.cc/LR53-YDJS].

174. Shear et al., *Judge Blocks Trump Order*, *supra* note 171.

175. See Jonah E. Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. TIMES (Jan 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html> [https://perma.cc/4TNQ-9WE2].

176. See generally *Darweesh v. Trump*, ACLU, <https://www.aclu.org/cases/darweesh-v-trump/> [https://perma.cc/A8DV-4UEL] (last visited June 20, 2018).

and included an emergency motion for stay to halt its further enforcement.¹⁷⁷ On Saturday, January 28, Judge Ann M. Donnelly granted the motion for stay and declared a temporary nationwide injunction on the Travel Ban.¹⁷⁸

As these events were unfolding at airports across the country, there was round the clock coverage of the Travel Ban's impact. Between Friday, January 27, 2017, and Sunday, January 29, 2017, 787 stories in the U.S. media covered the Travel Ban.¹⁷⁹ While Judge Donnelly's ruling was largely due to the work of the attorneys representing Mr. Darweesh, the intense media coverage and scrutiny this case received may have played a small role in the speed with which Judge Donnelly issued the order temporarily halting the Travel Ban.

On Monday January 30, 2017, the State of Washington filed a suit challenging the Travel Ban, alleging it caused injury to the state and its institutions.¹⁸⁰ Several days later, on February 3, 2017, Judge James L. Robard issued a nationwide temporary restraining order (TRO) prohibiting enforcement of section 3(c) and section 5 of the Travel Ban.¹⁸¹ The Trump Administration appealed and filed an emergency motion to stay the TRO with the Ninth Circuit Court of Appeals.¹⁸² In opposition to the government's motion for the stay of the TRO, the State of Washington submitted a joint declaration from ten former national security officials.¹⁸³ The declaration argued that

177. *Id.*

178. *Darweesh v. Trump*, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017).

179. PROQUEST, <https://search-proquest-com> (follow "Change Databases" hyperlink; then expand "Global Newsstream" and check only "US Newsstream"; then select "Use Selected Databases"; then click "Advanced Search"; then enter search terms "Travel Ban" (quotations not included) OR "Muslim Ban" (quotations included); then select from the "Publication Date" dropdown, "Specific date range. . ."; then enter the date range January 27, 2017–February 29, 2017) (last visited June 20, 2018).

180. *Washington v. Trump*, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017), *appeal dismissed*, 2017 WL 3774041 (9th Cir. Mar. 8, 2017).

181. *Id.* at *3 ("The court concludes that the circumstances brought before it today are such that it must intervene to fulfill its constitutional role in our tripart government.").

182. *Washington v. Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), and *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017), and *cert. denied*, *Golden v. Washington*, 138 S.Ct. 448 (2017).

183. *See generally* Joint Declaration of Madeleine K. Albright et al., *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) (including former

no particular threat justified the Executive Order, and that the Travel Ban undermined, rather than assisted, national security.¹⁸⁴

Oral arguments on the government's motion for stay before the Ninth Circuit were scheduled for February 7, 2017.¹⁸⁵ Due to the high interest in the case, the Ninth Circuit issued an order notifying the public that a live audio stream of the oral arguments could be accessed on the court's public website.¹⁸⁶ On February 7, 2017, 135,000 individuals listened to the livestreamed audio through the Ninth Circuit's website, and the cable news networks CNN and MSNBC broadcasted the live audio of the oral argument on-the-air.¹⁸⁷

On February 9, 2017, the three-judge panel of Judge William Canby, Jr., Judge Richard Clifton, and Judge Michelle Friedland issued a unanimous published decision denying the government's emergency motion for a stay pending appeal, thereby upholding the TRO as a preliminary injunction pending adjudication of the case on the merits.¹⁸⁸ On February 16, 2017, one week after the Ninth Circuit issued the order denying the motion for stay, the Trump Administration abandoned its efforts to implement the January 27 Executive Order, opting instead to issue a revised Executive Order.¹⁸⁹ In a filing in the Ninth Circuit, the DOJ explained the Administration's revised position, by stating:

Secretaries of State Madeleine K. Albright and John F. Kerry, former Secretary of Defense and CIA Director Leon E. Panetta, and former Secretary of Homeland Security Janet A. Napolitano).

184. *Id.* at *2.

185. Order at 1, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105), ECF No. 77.

186. *Id.*

187. Matt Pearce, *Appellate Hearing Over Trump's Travel Ban Gets Massive Online & TV Audience*, L.A. TIMES (Feb. 7, 2017, 4:36 PM), <http://beta.latimes.com/politics/la-live-updates-9th-circuit-arguments-appellate-hearing-over-trump-s-travel-1486513547-htlmstory.html> [<https://perma.cc/M5SN-LALH>].

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

189. *Washington v. Trump*, 855 F.3d 984 (9th Cir. 2017) (mem.); see Matt Zapotosky, *Trump Says He'll Issue a New Executive Order on Immigration by Next Week*, WASH. POST (Feb. 16, 2017), https://www.washingtonpost.com/world/national-security/trump-says-hell-issue-a-new-executive-order-on-immigration-by-next-week/2017/02/16/4b65e7d6-f463-11e6-a9b0ecee7ce475fc_story.html?utm_term=.9b2a37126ac4 [<https://perma.cc/G8FN-42F5>].

Rather than continuing this litigation, the President intends in the near future to rescind the Order and replace it with a new, substantially revised Executive Order to eliminate what the panel erroneously thought were constitutional concerns. . . . In so doing, the President will clear the way for immediately protecting the country rather than pursuing further, potentially time-consuming litigation. Under the unusual circumstances presented here—including the extraordinarily expedited proceedings and limited briefing to the panel, the complexity and constitutional magnitude of the issues, the Court’s *sua sponte* consideration of rehearing en banc, and respect for the President’s constitutional responsibilities—the government respectfully submits that the most appropriate course would be for the Court to hold its consideration of the case until the President issues the new Order and then vacate the panel’s preliminary decision.¹⁹⁰

On March 6, 2017, President Trump issued a revised Executive Order with several key changes, including the elimination of the indefinite ban on Syrian refugees.¹⁹¹

To those familiar with the typical timeline of federal court litigation, the speed of the decisions in *Darweesh v. Trump* and *Washington v. Trump* are remarkable. The speed with which the preliminary orders were rendered by the federal bench on the Travel Ban was principally motivated by the harm the plaintiffs would suffer if the Travel Ban were allowed to move forward.¹⁹² However, the intense media scrutiny likely had some impact on the speed of the proceedings. To provide a sense of the media coverage of the Travel Ban, between January 27, 2017, and February 27, 2017, a total of 12,589 stories were published in U.S. media sources covering the Travel Ban.¹⁹³

190. Supplemental Brief on En Banc Consideration at 4, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105).

191. Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

192. *Washington v. Trump*, 847 F.3d 1151, 1168–69 (9th Cir. 2017) (“When the Executive Order was in effect, the States contend that the travel prohibitions harmed the States’ university employees and students, separated families, and stranded the States’ residents abroad. These are substantial injuries and even irreparable harms.”).

193. PROQUEST, <https://search.proquest.com/> (follow “Change Databases” hyperlink; then expand “Global Newsstream” and check only “US Newsstream”; then select “Use Selected Database”; then follow “Advanced Search” hyperlink; then type “Travel Ban” (quotations included) in the first text box; then select “OR” in

3. *Use of Media Coverage to Support Litigation Challenging the Travel Ban*

The media also played an important role in exposing evidence that was used to support litigation challenging various versions of the Travel Ban. The clearest example of this was the January 28, 2017, Fox News interview by Jeanine Pirro of former New York City Mayor, Rudy Giuliani.¹⁹⁴ When asked how President Trump selected the seven countries designated in the January 27, 2017, Executive Order, Giuliani responded:

I'll tell you the whole history of it. So when he [Trump] first announced it, he said, "Muslim ban." He called me up. He said, 'Put a commission together. Show me the right way to do it legally.' I put a commission together with judge [Michael] Mukasey, with congressman [Mike] McCaul, Pete King, whole group of other very expert lawyers on this and what we did was we focused on—instead of religion—danger. The areas of the world that create danger for us, which is a factual basis, not a religious basis. Perfectly legal. Perfectly sensible. And that's what the ban is based on. It's not based on religion, it's based on places where there are substantial evidence that people are sending terrorists into our country.¹⁹⁵

Giuliani's comments have been repeatedly referenced as proof of the Trump Administration's intent to create a "Muslim ban."¹⁹⁶

the drop down box below the text box; then type "Muslim Ban" (quotations not included) in the second text box; then select from the "Publication date" dropdown "Specific date range..."; then enter date range January 27, 2017–February 27, 2017; then select "Search" button) (last visited June 20, 2018).

194. Fox News, *Judge Jeanine Pirro Rudy Giuliani FULL Interview January 28, 2017*, YOUTUBE (Jan. 31, 2017) [hereinafter *Judge Pirro & Rudy Giuliani Interview*], <https://www.youtube.com/watch?v=8jb3fo6jGbo> [<https://perma.cc/R7N4-HC2B>]; see Loulla-Maw Eleftheriou-Smith, *Donald Trump Asked Rudy Giuliani How to 'Legally' Create 'Muslim Ban', Claims Former New York Mayor*, INDEPENDENT (Jan. 30, 2017, 10:21 AM), <http://www.independent.co.uk/news/world/americas/donald-trump-muslim-ban-rudy-giuliani-how-legally-create-islam-us-immigration-entry-visa-new-york-a7552751.html> [<https://perma.cc/JA7F-XJKY>].

195. Eleftheriou-Smith, *supra* note 194; see *Judge Pirro & Rudy Giuliani Interview*, *supra* note 194.

196. See, e.g., Plaintiffs' Motion For A Preliminary Injunction And/Or Temporary Restraining Order of the Executive Order & Memorandum of Law In Support Thereof at 7, *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp.3d 539 (D. Md. Mar. 11, 2017) (No. 8:17-cv-00361-TDC) ("[T]wo days after the original Executive Order was issued, Rudolph Giuliani, an advisor to President Trump,

They have also allowed the courts to look beyond the four corners of the Executive Order when determining if an Establishment Clause argument would succeed on the merits.¹⁹⁷ Additionally, the media's reporting on Trump campaign events, where Candidate Trump promised a "complete shutdown of Muslims entering the United States," and tweets by the President expressing anti-Muslim sentiment have been used to support an Establishment Clause claim against the Travel Ban.¹⁹⁸ Even after the Trump Administration issued revised versions of the Travel Ban on March 6, 2017 and September 28, 2017 that were more facially neutral than the original January 27, 2017, Executive Order, these earlier comments continue to be cited in ongoing litigation as evidence of the President's true intent in implementing the ban.¹⁹⁹

While the attorneys may have been able to present other evidence in support of an Establishment Clause claim, the media record of the contemporaneous comments of President Trump and his associates clearly made it easier to establish their case.²⁰⁰ Between the amount of coverage and the role of the press in exposing evidence in support of an Establishment Clause claim, the media continues to play an important part in shaping the outcome, to date, in the ongoing Travel Ban litigation.²⁰¹

stated that then-candidate Trump had asked Mr. Giuliani for help in 'legally' creating a 'Muslim ban'; that in response, Mr. Giuliani and others decided to use territory as a proxy; and that this idea was reflected in the signed Order.").

197. *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp.3d 539, 558–59 (D. Md. Mar. 11, 2017).

198. *E.g.*, Complaint for Declaratory and Injunctive Relief at 6–7, *Washington v. Trump*, 2017 WL 462040 (W.D. Wash. Jan. 30, 2017) (No. 2:17-cv-00141) (containing allegations of statements made by presidential candidate Trump, including a statement on December 7, 2017 calling for "a total and complete shutdown of Muslims entering the United States"); see Ariane de Vogue, *How Donald Trump's Tweets are Helping to Fight His Travel Ban*, CNN (Feb. 15, 2017, 2:14 PM), <http://www.cnn.com/2017/02/15/politics/trump-twitter-travel-ban/index.html> [<https://perma.cc/YZ7G-7N7A>].

199. Ariane de Vogue, *Judges in Travel Ban Case Concerned About Trump Tweets*, CNN (Dec. 8, 2017, 2:55 PM), <http://www.cnn.com/2017/12/08/politics/travel-ban-trump-tweets/index.html> [<https://perma.cc/4YFU-MT4X>].

200. *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1139 (D. Haw. 2017) (considering previous comments made by President Trump and concluding that "the Court emphasizes that its preliminary assessment rests on the peculiar circumstances and specific historical record present[ed] here.").

201. Michael D. Shear et al., *Supreme Court Cancels Hearing on Previous Trump Travel Ban*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/>

In subsequent months, media coverage of the Travel Ban and impact litigation challenging the two later versions of the Travel Ban waned.²⁰² Because the impact of newer versions of the Travel Ban is playing out overseas at U.S. consular posts instead of in the airports, it is difficult to hold the public's attention on this issue.²⁰³ Nonetheless, as impact litigation challenging the third indefinite version of the Travel Ban makes its way through the courts, media coverage and public engagement will be critical to illuminate the impact on nationals of the named countries and harm to their relatives and business ties in the U.S.

B. Border Security Executive Order and Department of Homeland Security Memorandum

While it is clear that increased media coverage can shape the course of impact litigation challenging Presidential executive action on immigration, what happens when that coverage is lacking? Unlike the Travel Ban and the Border Security Executive Order, subsequent

09/25/us/politics/trump-travel-ban-supreme-court.html [https://perma.cc/TM9T-LY8N] (discussing critics of the Travel Ban “point[ing] to Mr. Trump’s history of calling for a ban on Muslim entry into the United States”).

202. Between February 28, 2017 and December 1, 2017, a total of 17,062 stories were published by U.S. News Sources about the Travel Ban. PROQUEST, <https://search.proquest.com/> (follow “Database” hyperlink; then expand “Global Newsstream” and check only “US Newsstream”; then select “Use Selected Database”; then follow “Advanced Search” hyperlink; then type “Travel Ban” OR “Muslim Ban” (quotations included) in the second text box; then select from the “Publication date” dropdown “Specific date range...”; then enter date range February 28, 2017–December 1, 2017; then select “Search” button) (last visited June 20, 2018). The total number of news stories over this nine month period was only slightly higher than the number of stories (12,589) published about the Travel Ban in the one month period immediately after the first Travel Ban was signed by President Trump. *Id.* (follow “Change Databases” hyperlink; then expand “Global Newsstream” and check only “US Newsstream”; then select “Use Selected Database”; then follow “Advanced Search” hyperlink; then type “Travel Ban” (quotations not included) OR “Muslim Ban” (quotations included) in the second text box; then select from the “Publication date” dropdown “Specific date range...”; then enter date range January 27, 2017–February 27, 2017; then select “Search” button) (last visited June 20, 2018).

203. See, e.g., *U.S. has Begun Fully Implementing Trump Travel Ban: State Dept.*, REUTERS (Dec. 8, 2017, 11:13 AM), <https://www.reuters.com/article/us-usa-immigration-ban/u-s-has-begun-fully-implementing-trump-travel-ban-state-dept-id-USKBN1E22CB> [https://perma.cc/NXC2-PAE6] (discussing President Trump’s newer Executive Order as “calling for ‘enhancing vetting capabilities’ at U.S. embassies and consulates overseas”).

agency actions on the border and the impact on asylum seekers received comparatively little media attention and were allowed to move forward with minimal pushback.²⁰⁴

Nearly one year into the Trump Administration, legal advocates began filing suits against the Trump Administration, challenging actions and policies by the Administration implemented under the January 2017 Border Security Executive Order.²⁰⁵ Nevertheless, one cannot help but wonder if these legal challenges would have commenced earlier had there been more national media coverage of the Trump Administration's efforts to implement the Border Security Executive Order along with other actions against Central American asylum seekers on the southern border.

1. Impact to Central American Asylum Seekers

During his first week in office, President Trump issued the Border Security Executive Order, setting forth a number of policy goals and administrative changes governing immigration enforcement along the southern border.²⁰⁶

Section 1 of the Border Security Executive Order states that the purpose of the order is to “direct executive departments and agencies . . . to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to *repatriate illegal aliens swiftly, consistently, and humanely.*”²⁰⁷ Yet, as the Obama Administration learned with its initial response to the Central American Migrant Crisis, the swift repatriation of apprehended aliens could be deemed unlawful if the

204. *Harvard Releases Report on Effect of Trump’s Executive Orders on Asylum Seekers*, HARV. L. TODAY (Feb. 8, 2017), <https://today.law.harvard.edu/harvard-releases-first-report-effect-trumps-executive-orders-asylum-seekers/> [<https://perma.cc/K3FH-CBQR>] (“In the wake of the executive orders, media attention has focused largely on the travel ban involving seven predominantly Muslim nations, but the impact of the orders on asylum seekers from around the world has received little attention.”).

205. Ryan Devereaux, *U.S. Illegally Denying Immigrants Their Right to Seek Asylum at the Mexican Border, According to Lawsuit*, INTERCEPT (Nov. 16, 2017, 1:38 PM), <https://theintercept.com/2017/11/16/immigration-asylum-seekers-denied-border-entry-lawsuit/> [<https://perma.cc/3S2W-AA8P>] (discussing legal actions filed against the Trump Administration in California and Texas stemming from the Border Security Executive Order).

206. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

207. *Id.* at 8793 (emphasis added).

government denies an individual the opportunity to pursue an asylum claim.²⁰⁸

Five sections of the Border Security Executive Order contain language that, if enacted as written, would have a significant negative impact on Central American asylum seekers. The first of these, sections 5 and 6, call for expanded detention of apprehended immigrants pending outcome of their removal proceedings²⁰⁹ and allocation of resources to construct new detention facilities along the southern border.²¹⁰ Section 7 directs DHS to return individuals apprehended to the last country of passage while their removal proceedings are waiting to be heard by an immigration judge.²¹¹ Even more problematic, section 11 aims at eliminating “the abuse of parole and asylum provisions,” calling for more stringent screening of asylum seekers during the credible fear assessment and imposing significant limitations on parole of asylum seekers who have passed their credible fear screenings.²¹² Lastly, section 13 directs the Attorney General to “establish prosecution guidelines . . . to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border,” including increased criminal prosecution for illegal entry.²¹³

On February 20, 2017, several weeks after the issuance of the Border Security Executive Order, DHS issued an implementation memo (DHS Border Security Memo) providing guidance on how the agency should implement the Executive Order.²¹⁴ The DHS Border

208. As noted above, on August 22, 2014, at the height of the Central American Migrant Crisis, the ACLU, AIC, NLG, and NILC filed a class action suit, *M.S.P.C. v. Johnson*, on behalf of mothers detained at the Artesia detention facility. See *supra* note 68 and accompanying text. The suit alleged that the government violated mothers' due process rights during initial asylum screenings and failed to properly consider their asylum claims during the credible fear process. See *supra* note 69–70 and accompanying text. This lawsuit was dismissed by motion of the plaintiffs after DHS properly addressed the alleged due process violations and closed the Artesia Detention Center. See *supra* notes 77–80 and accompanying text.

209. *Id.* at 8795.

210. *Id.* at 8794–95.

211. *Id.* at 8795.

212. *Id.* at 8795–96.

213. See *id.* at 8796.

214. Memorandum from John Kelly, Sec'y, U.S. Dep't Homeland Sec., to Kevin McAleenan et al., Acting Comm'r, U.S. Customs & Border Protection, Implementing the President's Border Security and Immigration Enforcement Improvements Policies 1 (2017) [hereinafter DHS Border Security Memo], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing

Security Memo provided further guidance on procedures for asylum screening, limits on parole, and increased prosecutions.²¹⁵ It also included new language describing the possible expansion of expedited removal and measures limiting protections for unaccompanied minors.²¹⁶

With respect to asylum seekers, section I of the DHS Border Security Memo sets forth a seemingly more stringent standard for passing a credible fear interview, stating that “an alien must demonstrate that there is a ‘significant possibility’ that the alien could establish eligibility for asylum.”²¹⁷ In its analysis of the Border Security Executive Order and DHS Border Security Memo, the Migration Policy Institute expressed concerns about the “significant possibility of establishing eligibility for asylum” credible fear standard, particularly for Central Americans, noting:

DHS also states that determinations should include consideration of the statistical likelihood that the claim would be granted by an immigration judge. Asylum grant rates for Central Americans in immigration court are among the lowest of any national-origin group This . . . indicates that credible fear and reasonable fear determination standards will be tightened, making it more difficult for asylum seekers to lodge claims after they are apprehended to the border.²¹⁸

In contrast, the DHS Border Security Memo guidelines for parole determinations and detention of asylum seekers are considerably more moderate than the language contained in the Border Security Executive Order.²¹⁹ Of note, section A of the DHS Border Security Memo confirmed that DHS would continue to release individuals on parole “[w]hen required to do so by statute,

-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [https://perma.cc/MY3J-PES6].

215. *See id.* at 2–12.

216. *See id.*

217. *Id.* at 8 (quoting INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (Supp. 2017)).

218. FAYE HIPSMAN & DORIS MEISSNER, MIGRATION POLICY INSTITUTE, TRUMP EXECUTIVE ORDER AND DHS IMPLEMENTATION MEMO ON BORDER ENFORCEMENT: A BRIEF REVIEW (2017), <https://www.migrationpolicy.org/research/trump-executive-order-and-dhs-implementation-memo-border-enforcement-brief-review> [https://perma.cc/MDR7-XWMT] (select “Download Brief”).

219. *Compare* Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017), *with* DHS Border Security Memo, *supra* note 214.

or to comply with a binding settlement agreement or order issued by a competent judicial or administrative authority.”²²⁰ This would allow for the ongoing release of Central American family units, in accordance with the *Flores* settlement. Additionally, section K of the DHS Border Security Memo states that the 2009 Obama Administration policy directive to grant parole to arriving aliens seeking asylum who pass a credible fear of persecution screening and pose no security, safety, or flight risk²²¹ remains in effect pending further changes or directives by the DHS Secretary.²²²

The additional sections of the DHS Border Security Memo directly impacting Central Americans are sections L and M, relating to the processing of unaccompanied minors. Section L of the DHS Border Security Memo states that “[a]pproximately 60% of minors initially determined to be ‘unaccompanied alien children’ are placed in the care of one or more parents illegally residing in the United States,” implying that unaccompanied minors placed in the custody of a parent should not continue to be afforded protections under TVPRA.²²³ Additionally, section M contains harsh language against parents who facilitate the smuggling of their children to the U.S. and directs ICE and CBP to “ensure the proper enforcement of our immigration laws against any individual who—directly or indirectly—facilitates the illegal smuggling or trafficking of an alien child into the U.S.”²²⁴

Taken together, all of the proposed measures set forth in the Border Security Executive Order and accompanying DHS Border Security Memo have the potential to dramatically change the way asylum seekers are processed along the southern border. Given the large number of unaccompanied minors and family units from the Northern Triangle apprehended along the southern border every year, these measures have the potential to impact tens of thousands of people fleeing violence and may dramatically decrease their ability to present a successful asylum claim.

220. DHS Border Security Memo, *supra* note 214, at 2.

221. See ICE 2009 DIRECTIVE 11002.1, *supra* note 39.

222. DHS Border Security Memo, *supra* note 214, at 9–10.

223. *Id.* at 10–11.

224. *Id.* at 11.

2. *Disparate Level of Media Coverage of the Border Security Executive Order*

While a lack of appropriated congressional funds has prevented the Border Security Executive Order goals of constructing a wall and detention facilities along the border, other measures not requiring funding or new regulations did move forward.²²⁵ Additionally, like the Travel Ban, there are portions of the Border Security Executive Order and actions taken by the Administration to implement these directives that could be deemed unlawful if challenged in court.²²⁶ However, in contrast to the Travel Ban, impact litigation challenging the Trump Administration's actions along the border has been slow to follow.

One possible reason why there has been limited impact litigation challenging the Trump Administration's implementation of the Border Security Executive Order is the limited media coverage highlighting potentially unlawful conduct at the border. Unlike press coverage of the Travel Ban, with over 12,000 stories published in the month after it was issued,²²⁷ only 626 stories were published in

225. *See, e.g., id.* at 3 (discussing the mandate of hiring of "5,000 additional Border Patrol Agents" and "500 Air & Marine Agents/Officers").

226. *See* ACLU, EXECUTIVE ORDER "BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS" 2 (2017), <https://www.aclu.org/executive-order-border-security-and-immigration-enforcement-improvements> [<https://perma.cc/WL7Y-T86R>].

The implementation of this EO may result in the removal of migrants without due process or judicial recourse; more frequent detention of migrants (including families with young children) without individualized determination and when not justified by exceptional circumstances; the separation of families without regard for their ties to the United States or the best interests of the child; an increased likelihood that undocumented individuals will be the victims of crime and violence, and denied equal access to justice due to fear of seeking assistance from local police; and the denial of a meaningful opportunity to make an asylum claim, resulting in violations of U.S. non-refoulement obligations.

Id.

227. PROQUEST, <https://search.proquest.com/> (follow "Change Databases" hyperlink; then expand "Global Newsstream" and check only "US Newsstream"; then select "Use Selected Database"; then follow "Advanced Search" hyperlink; then type "Travel Ban" (quotations not included) OR "Muslim Ban" (quotations included) in first text box; then select from the "Publication date" dropdown "Specific date range..."; then enter date range January 27, 2017–February 27, 2017; then select "Search" button) (last visited June 20, 2018).

U.S. media sources about the Border Security Executive Order between January 25, 2017 and February 25, 2017.²²⁸

Additionally, since January 2017, much of the coverage of this Executive Order has centered on tough rhetoric by DHS and DOJ officials instead of actions by the Trump Administration along the southern border.²²⁹ Whether intentional or not, focusing on the speech versus the actions of government officials at the border effectively created a smoke screen, diverting attention away from questionable actions by officials that could be challenged in court.

3. *Tough Rhetoric on Border Security Aimed at Creating a Deterrent Effect*

One clear objective of the Border Security Executive Order and DHS Border Security Memo was to create a deterrent effect to discourage future illegal border crossings along the southern border.²³⁰ Furthering this goal, then DHS Secretary John Kelly and other high-ranking DHS officials made a series of statements in the spring of 2017 indicating that DHS would be implementing new policies first outlined in the Border Security Executive Order and DHS Border Security Memo.²³¹

One early example of this harsh rhetoric from Secretary Kelly was the proposed change in the processing of family units apprehended at the border. In a March 7, 2017, interview with CNN, Secretary Kelly confirmed a previous statement by a senior DHS official on March 4, 2017 that the agency was considering separating

228. *Id.* (follow “Change Databases” hyperlink; then expand “Global Newsstream” and check only “US Newsstream”; then select “Use Selected Database”; then follow “Advanced Search” hyperlink; then type “Border Security” and “Executive Order” (quotations included) in the first text box; then select from the “Publication date” dropdown “Specific date range...”; then enter date range January 25, 2017–February 25, 2017; then select “Search” button) (last visited June 20, 2018).

229. See Jessica Schneider & David Shortell, *Sessions’ Agenda at DOJ Reflects Trump’s, Despite Rocky Relationship*, CNN (Jan. 5, 2018, 6:15 PM), <http://www.cnn.com/2017/12/31/politics/doj-year-end-recap/index.html> [<https://perma.cc/4NSR-4ALA>] (discussing Attorney General Jeff Sessions’ public statements committing to be tough on crime).

230. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

231. Press Release, John Kelly, Sec’y, Dep’t of Homeland Sec., Statement on President’s Executive Order (March 6, 2017), <https://www.dhs.gov/news/2017/03/06/statement-secretary-homeland-security-john-kelly-presidents-executive-order-signed> [<https://perma.cc/ASX2-5TB2>].

children from their parents at the border.²³² This statement marked a significant departure from the policy of processing parents and children apprehended at the border as family units.²³³ Secretary Kelly justified the proposed change in policy because of its deterrent effect, stating, in part, “I’m considering [separating children from their parents], in order to deter more movement along this terribly dangerous network.”²³⁴

Secretary Kelly’s statements on the possible separation of parents and minor children garnered considerable attention from the press. Between March 4, 2017, the date this proposed change was first announced by a senior DHS official, and April 30, 2017, 652 stories were published in U.S. media sources.²³⁵ Following this increased scrutiny by the press, Secretary Kelly backtracked his earlier remarks at a meeting with Senate Democrats on March 26, 2017, confirming that the DHS would not separate mothers and children at the border unless there was an extenuating reason, such as illness.²³⁶

On December 21, 2017, the Washington Post reported that the Trump Administration was once again considering separating parents and minor children apprehended at the southern border.²³⁷

232. Danielle Diaz, *Kelly: DHS is Considering Separating Undocumented Children From Their Parents at the Border*, CNN (Mar. 7, 2017, 7:33 AM), <http://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html> [https://perma.cc/5CM9-SD5S].

233. *Id.*

234. *Id.*

235. PROQUEST, <https://search.proquest.com/> (follow “Change Databases” hyperlink; then expand “Global Newsstream” and check only “US Newsstream”; then select “Use Selected Database”; then follow “Advanced Search” hyperlink; then type “Kelly” (quotations not included) AND “Family” (quotations not included) AND “Homeland Security” (quotations included) in the first text box; then select from the “Publication date” dropdown “Specific date range...”; then enter date range March 4, 2017–April 30, 2017; then select “Search” button) (last visited June 20, 2018).

236. Tal Kopan, *Kelly says DHS Won’t Separate Families at the Border*, CNN, (Mar. 29, 2017, 10:15 PM), <http://www.cnn.com/2017/03/29/politics/border-families-separation-kelly/index.html> [https://perma.cc/6UQM-XQK2].

237. Nick Miroff, *To Curb Illegal Border Crossings, Trump Administration Weighs New Measures Targeting Families*, WASH. POST (Dec. 21, 2017), https://www.washingtonpost.com/world/national-security/to-curb-illegal-border-crossings-trump-administration-weighs-new-measures-targeting-families/2017/12/21/19300dc2-e66c-11e7-9ec2-518810e7d44d_story.html?hpid=hp_hp-top-table-main_dhs_610pm%3Ahome-page%2Fstory&utm_term=.19633974c6ec [https://perma.cc/PLH6-59E4].

This proposal was once again met with considerable outcry, with a number of published news reports and opinion pieces criticizing this proposed action.²³⁸ While DHS has not issued a denial in response to the Washington Post story, to date, current DHS Secretary Kirstjen Nielsen has not approved this proposal or any other changes to the processing of family units apprehended at the border.²³⁹

Another member of the Trump Administration known for his public statements supporting stronger border security is Attorney General Jeff Sessions.²⁴⁰ On October 12, 2017, Attorney General Sessions delivered a controversial speech to the Executive Office of Immigration Review in Falls Church, Virginia alleging rampant abuse of asylum laws.²⁴¹ In his remarks, Attorney General Sessions claimed many immigrants apprehended at the border present a false claim for asylum as a means to enter the country, stating:

We have a generous asylum policy that is meant to protect those who, through no fault of their own, cannot co-exist in their home country no matter where they go because of persecution based on fundamental things like their religion or nationality. Unfortunately, this system is currently subject to rampant abuse and fraud. And as this system becomes overloaded with fake claims, it cannot deal effectively with just claims. . . . The system is being gamed.

238. See, e.g., Priscilla Alvarez, *Detering Illegal Immigration by Separating Parents and Children*, ATLANTIC (Dec. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/12/trumps-plan-to-deter-immigrants-from-coming-to-the-unitedstates/549221/> [<https://perma.cc/28KS-T632>]; Elizabeth Oglesby, Opinion, *Taking Away Their Children Won't Stop Central American Border Crossers*, THE HILL (Jan. 2, 2018, 5:30 PM), <http://thehill.com/opinion/immigration/367115-taking-away-their-children-won-t-stop-central-american-border-crossers> [<https://perma.cc/FY7J-3RJG>].

239. See Alvarez, *supra* note 238.

240. See, e.g., Seung Min Kim & Josh Gerstein, *What Jeff Sessions Thinks About Immigration, Police & Terrorism*, POLITICO (Jan. 10, 2017), <https://www.politico.com/story/2017/01/jeff-sessions-views-attorney-general-233383> [<https://perma.cc/2E3U-78GM>]; Adam Serwer, *Jeff Session's Unqualified Praise for a 1924 Immigration Law*, ATLANTIC (Jan. 10, 2017), <https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/> [<https://perma.cc/42X2-3LT6>]; Sen. Jeff Sessions, *Opinion: America Needs to Curb Immigration Flows*, WASH. POST (Apr. 9, 2015), https://www.washingtonpost.com/opinions/slow-the-immigration-wave/2015/04/09/c6d8e3d4-dd52-11e4-a5001c5bb1d8ff6a_story.htm?nid&utm_term=.04d5fda0128d [<https://perma.cc/7DR9-R5ZX>].

241. Jeff Sessions, Attorney Gen., Dep't of Justice, Remarks to Executive Office for Immigration Review (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> [<https://perma.cc/YU9A-CGUB>].

The credible fear process was intended to be a lifeline for persons facing serious persecution. But it has become an easy ticket to illegal entry into the United States.²⁴²

Attorney General Sessions was also critical of immigration attorneys who represent immigrants apprehended at the border in their credible fear interviews, stating: “We also have dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum providing them with the magic words needed to trigger the credible fear process.”²⁴³

These remarks were covered in a number of major news publications, including the Washington Post²⁴⁴ and the Wall Street Journal,²⁴⁵ and drew sharp criticism from immigration attorneys and advocates.²⁴⁶ However, this tough rhetoric has not yet led to any

242. *Id.*

243. *Id.*

244. See Sari Horiwitz, *Sessions Calls on Congress to Tighten Rules for Asylum Seekers*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/world/national-security/sessions-calls-on-congress-to-tighten-rules-for-people-seeking-asylum/2017/10/12/9a1c6c3e-af56-11e7-a908-a3470754bbb9_story.html [https://perma.cc/3KS3-H28R]; Nicole Lewis, *Fact Checker: Sessions Claim that ‘Dirty Immigration Lawyers’ Encourage Clients to Cite ‘Credible Fear’*, WASH. POST. (Oct. 26, 2017), <https://www.washingtonpost.com/news/fact-checker/wp/2017/10/26/sessions-claim-that-dirty-immigration-lawyers-encourage-clients-to-cite-credible-fear/> [https://perma.cc/2TJL-4CF7]; Nickole Miller, *Letter to the Editor: Jeff Sessions Claims About Asylum Seekers Were Wildly Inaccurate*, WASH. POST. (Oct. 15, 2017), https://www.washingtonpost.com/opinions/jeff-sessions-claims-about-asylum-seekers-were-wildly-inaccurate/2017/10/15/23dd83c6-b020-11e7-9b93-b97043e57a22_story.html [https://perma.cc/CV9Y-3CBR];

245. See Alicia A. Caldwell, *Sessions Expands on Trump Plan to Toughen Asylum Process*, WALL ST. J. (Oct. 12, 2017, 6:25 PM), <https://www.wsj.com/articles/sessions-expands-on-trump-plan-to-toughen-asylum-process-1507847158> [https://perma.cc/2MWM-39YD]; Aruna Viswanatha, *Jeff Sessions to Face Questions on Immigration, Other Contentious Issues*, WALL ST. J. (Oct. 18, 2017, 7:00 AM), <https://www.wsj.com/articles/jeff-sessions-set-to-face-questions-on-immigration-other-contentious-issues-1508324401> [https://perma.cc/S8CJ-G673].

246. See, e.g., *Attorney General Derides the Role of Due Process in the American Asylum System*, AILA (Oct. 12, 2017), <http://www.aila.org/advo-media/press-releases/2017/aila-attorney-general-derides-the-role-of-due-process> [https://perma.cc/ZS6D-FRX7]; Amanda Holpuch, *Leading Immigration Lawyer Condemns Sessions’ Attack on Asylum System*, THE GUARDIAN (Oct. 13, 2017, 4:00 PM), <https://www.theguardian.com/us-news/2017/oct/13/jeff-sessions-asylum-immigration-annaluisa-padilla> [https://perma.cc/2C94-7YNR]; Stephen W. Manning & Michelle Mendez, *Trump, Sessions Attack Immigration Lawyers in Latest Affront to Rule of Law*, THE HILL (Oct. 18, 2017, 6:40 AM), <http://thehill.com/opinion/immigration/355958-trump-sessions-latest-affront-to-rule-of-law-attack-immigration-lawyers> [https://perma.cc/

major significant policy changes in these areas. To date, the official policy of DHS is to process parents and minor children apprehended at the border as family units,²⁴⁷ and the Trump Administration has not reinstated a formal policy of long-term family detention. Additionally, while issues continue to arise with prompt release of detainees in compliance with Judge Gee's July 2015 order, the majority of family units who undergo and pass a credible fear screening at a family detention center are quickly processed and released in compliance with the *Flores* settlement.²⁴⁸ Although the Administration has criticized the "loopholes" created by the TVPRA, DHS has not taken any steps to eliminate protections under the TVPRA for unaccompanied minors who reunite with a parent in the U.S.²⁴⁹ Furthermore, according to the most recent available statistics, nearly 80 percent of immigrants apprehended at the border who underwent a credible fear interview had a positive finding of credible fear.²⁵⁰

While DHS never implemented a formal policy of separating family units apprehended at the border, Secretary Kelly's comments, combined with the language in the Border Security Executive Order and DHS Border Security Memo, created a temporary deterrent effect. FY 2017 saw a significant decrease in apprehensions along the

7Y85-XDRJ].

247. See U.S. CUSTOMS & BORDER PROT., DEP'T OF HOMELAND SEC., UNITED STATES BORDER PATROL SOUTHWEST FAMILY UNIT SUBJECT AND UNACCOMPANIED ALIEN CHILDREN APPREHENSIONS FISCAL YEAR 2016, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> [https://perma.cc/7HTD-HN3E] (last visited June 20, 2018).

248. In a June 27, 2017, order granting, in part, Plaintiff's Motion to Enforce, Judge Gee referenced evidence presented by the United States government, confirming that 95 percent of individuals detained at the family detention centers in Dilley, Texas, Karnes, Texas, and Berks County, Pennsylvania were released within 20 days of detention. See *Flores v. Sessions*, CV 85-4544 DMG (AGRx) (C.D.C.A. June 27, 2017).

249. See Letter to Congressional Leaders Transmitting a Report on Immigration Principles and Policies, 2017 DAILY COMP. PRES. DOC. 734 (Oct. 8, 2017).

250. According to recent statistics published by the United States Citizenship and Immigration Services Asylum Division, in FY 2017, 47,833 of the 62,757 cases (76.3%) that underwent a credible fear screening had a positive finding of credible fear. See U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY-FY 2017 TOTAL CASELOAD, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearandReasonableFearStatisticsandNationalityReport.pdf [https://perma.cc/WRQ4-3JFN] (last visited June 20, 2018).

southern border, with a dramatic decrease in apprehensions between February and June 2017.²⁵¹ April 2017, in particular, marked a five-year low in apprehensions, with only 15,766 total apprehensions—roughly one-third of the apprehensions in April 2016.²⁵² By the fall of 2017, the deterrent effect had worn off, and southern border apprehensions were once again on the rise.²⁵³ Considering that DHS has not yet implemented the procedures to separate parents and minor children apprehended as family units on the border, it is entirely possible that DHS hoped the recently leaked reports would recreate the deterrent effect seen in third quarter of FY 2017.

C. Less Publicized Actions by the Trump Administration on the Southern Border

Those who were apprehended at the southern border in FY 2017 ultimately faced actions that, although less publicized, were just as harsh as the policies outlined in the Border Security Executive Order that never came to fruition. The sections below discuss three

251. FY 2017 saw the lowest number of Border Patrol apprehensions along the southern border, an indicator of total number of illegal crossings, in modern history with 303,916 total apprehensions for the year. *See* U.S. CUSTOMS & BORDER PROT., DEP'T OF HOMELAND SEC., CBP SW. BORDER TOTAL Apprehensions/Inadmissibles Statistics, <https://www.cbp.gov/newsroom/stats/sw-border-migration> [<https://perma.cc/265J-U3AE>] (last visited June 20, 2018). Apprehensions decreased significantly in the five-month period from February to June 2017 with only 97,506 apprehensions. U.S. CUSTOMS & BORDER PROT., DEP'T OF HOMELAND SEC., SOUTHWEST BORDER MIGRATION FY 2017, <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017> [<https://perma.cc/RN7L-8AAS>] (last visited June 20, 2018). By way of comparison, in FY 2016, there were a total of 408,870 apprehensions along the southern border, with 234,092 apprehensions between February and June of 2016. *See* U.S. CUSTOMS & BORDER PROT., DEP'T OF HOMELAND SEC., U.S. BORDER PATROL APPREHENSIONS/SEIZURE STATISTICS—FISCAL YEAR 2016, at 4 (Jan. 2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Jan/USBP%20Stats%20FY2016%20sector%20profile.pdf> [<https://perma.cc/W78P-Q5YE>].

252. In April 2016, there were a total of 48,502 apprehensions along the southern border. U.S. CUSTOMS & BORDER PROT., DEP'T OF HOMELAND SEC., U.S. BORDER PATROL APPREHENSIONS/SEIZURE STATISTICS—FISCAL YEAR 2016, at 4 (Jan. 2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Jan/USBP%20Stats%20FY2016%20sector%20profile.pdf> [<https://perma.cc/W78P-Q5YE>]. In April 2017, there were a total of 15,766. *Id.*

253. By FY 2017 Q4, border apprehensions were on the rise, with a total of 86,726 apprehensions between July 2017 and September 2017. *Id.*

of the actions taken by DHS Officials as part of the agency's efforts to implement the Border Security Executive Order. Furthermore, they examine how the lack of media coverage and public engagement may have shaped legal advocacy and impacted litigation challenging these measures.

1. *Blanket Denial of Parole to Asylum Seekers*

One troubling issue that has emerged along the southern border and other points of entry is the mass detention of asylum seekers who have established a credible fear of persecution.²⁵⁴ Individuals without a valid visa who turn themselves in to a CBP or Border Patrol agent at a U.S. port of entry in order to request asylum are considered "arriving aliens," and are subject to mandatory detention under INA § 235.²⁵⁵ However, under 8 C.F.R. § 212.5, arriving aliens may be, on a case-by-case basis, released on parole due to "urgent humanitarian reasons" or "a significant public benefit," provided the aliens present neither a security risk nor a risk of absconding.²⁵⁶ Since 2009, the Obama Administration policy directive has been the official policy of DHS governing whether asylum seekers are released on parole.²⁵⁷ This policy states that the detention of arriving aliens who pass a credible fear interview is not in the public interest and recommends these asylum seekers be

254. HUM. RTS. FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS 8–13 (2016) [hereinafter HUM. RTS. FIRST, LIFELINE ON LOCKDOWN], http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf [<https://perma.cc/ZL8F-GBJF>].

255. See INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii) (Supp. 2017). Under INA § 235, any arriving alien who is not admitted or paroled into the U.S., including asylum seekers who claim a credible fear of persecution at a U.S. port of entry, are ineligible for release on bond and subject to mandatory detention until an immigration judge issues a final determination to grant or deny asylum. See INA § 235(b), 8 U.S.C. § 1225(b); 8 C.F.R. § 1003.19 (2017). Conversely, individuals who enter the U.S. unlawfully without inspection who are apprehended within U.S. territory shortly after entry are eligible for a bond hearing before an immigration judge and release on bond after establishing credible fear of persecution under 8 CFR § 1003.19. See INA § 235(b), 8 U.S.C. § 1225(b); 8 CFR § 1003.19; see also Allegra Love, *A Very Complicated Legal Explanation About ICE and Immigrants and Parole*, MEDIUM (June 19, 2017), <https://medium.com/@allegralove1/a-very-complicated-legal-explanation-about-ice-and-immigrants-and-parole-ba9db3fe947a> [<https://perma.cc/956U-TVMX>].

256. 8 C.F.R. § 212.5(b) (2017).

257. ICE 2009 DIRECTIVE 11002.1, *supra* note 39.

released on parole.²⁵⁸ While the number of asylum seekers released on parole decreased following the 2014 Central American Migrant Crisis, many asylum applicants continued to be released on parole during the last two years of the Obama Administration after passing a credible fear interview.²⁵⁹

Although the DHS Border Security Memo indicated that the 2009 Obama Administration policy directive remained in effect with respect to parole of asylum applicants who had passed a credible fear interview,²⁶⁰ reports from detained asylum seekers and attorneys indicate this is not the case.²⁶¹ On the contrary, the DHS under the Trump Administration appears to have adopted a blanket policy where it will no longer release asylum seekers on parole and instead will detain asylum applicants indefinitely while their asylum case is pending before an immigration judge.²⁶² This change in policy, triggered by the Border Security Executive Order, has led to the prolonged detention of asylum seekers, creating serious barriers to due process (particularly access to legal representation) in immigration proceedings.²⁶³ A recent report by Human Rights First

258. *Id.* at ¶ 6.2.

259. HUM. RTS. FIRST, LIFELINE ON LOCKDOWN, *supra* note 254, at 8–9, 13. The release of arriving alien asylum seekers who had a positive finding of credible fear decreased significantly after the Central American Minor Crisis in 2014. *Id.* at 13. In 2012, 80 percent of arriving asylum seekers who passed their credible fear interview were released on parole, compared to the first three quarters of FY 2015 when only 47 percent of arriving alien asylum seekers were released on bond. *Id.*

260. *See* DHS Border Security Memo, *supra* note 214, at 8–9.

261. *See* HUM. RTS. FIRST, JUDGE AND JAILER: ASYLUM SEEKERS DENIED PAROLE IN WAKE OF TRUMP EXECUTIVE ORDER 6 (Sept. 2017) [hereinafter HUM. RTS. FIRST, JUDGE AND JAILER], <https://www.humanrightsfirst.org/sites/default/files/hrf-judge-and-jailer-final-report.pdf> [<https://perma.cc/NK4R-M6V7>].

262. In a September 2017 report, Human Rights First found that since the Border Security Executive Order and the DHS Border Security Memo were issued: ICE’s implementation of parole for arriving asylum seekers has shifted in many detention facilities across the country. In these detention locations, eligible asylum seekers were sometimes released from detention on parole during the end of the Obama Administration. Now they are rarely, if ever, released on parole.

Id.

263. A 2017 Human Rights First report raised concerns that increased detention and directives in the DHS Border Security Memo to expedite asylum claims at detention facilities near the southern border “could deprive detained asylum seekers and other immigrants of the chance to secure legal counsel and gather evidence” in support of their asylum claim. HUM. RTS. FIRST, TILTED JUSTICE: BACKLOGS GROW WHILE FAIRNESS SHRINKS IN U.S. IMMIGRATION COURTS 4

also found that in some jurisdictions asylum applicants voluntarily withdrew their asylum application and accepted a removal order because they did not want to be detained in jail-like conditions indefinitely.²⁶⁴ More recently, news outlets published a December 14, 2017, DHS policy directive authorizing the indefinite detention of pregnant women.²⁶⁵ This change marks a major shift from the previous DHS policy to not detain pregnant women—save for cases of extraordinary circumstances—and to release pregnant women on parole.²⁶⁶

While widespread denial of parole for arriving aliens seeking asylum has been commonplace since the Border Security Executive Order was first issued, no legal challenges were filed against this policy until July 28, 2017, approximately six months after President Trump signed the Executive Order.²⁶⁷ On this date, the New York Civil Liberties Union and IRAP filed a class action suit—on behalf of arriving alien asylum seekers detained at the Buffalo Federal Detention Facility in Batavia, New York—challenging DHS's practice of indiscriminately denying parole to detainees at the facility.²⁶⁸

In their amended petition and motion for injunctive relief, Plaintiffs alleged that DHS officials had failed to follow agency procedure outlined in the 2009 policy directive when making parole determinations for asylum seekers who had passed a credible fear determination.²⁶⁹ In support of their complaint, Plaintiffs cited

(Sept. 2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-tilted-justice-final%5B1%5D.pdf> [<https://perma.cc/4PFR-V6B9>].

264. HUM. RTS. FIRST, JUDGE AND JAILER, *supra* note 261, at 4.

265. Rafael Bernal, *ICE Will Detain Pregnant Women, Ending Previous Policy*, THE HILL (Mar. 29, 2018), <http://thehill.com/latino/380827-ice-will-detain-pregnant-women-ending-previous-policy> [<https://perma.cc/N8WG-6MKK>].

266. See Memorandum from Thomas Homan, Exec. Assoc. Dir., U.S. Immigration and Customs Enf't, to Field Office Directors et. al. (Aug. 15, 2016), https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentificationMonitoringPregnantDetainees.pdf [<https://perma.cc/DQ87-AE9A>].

267. See Kimberly J. Winbush, *Issuance of Presidential Executive Orders Concerning Immigration or Immigrants*, 25 A.L.R. Fed. 3d Art. 2 (2017) (discussing cases addressing challenges and/or interpretations of presidential executive orders that relate to immigration and related issues such as rights of aliens or citizenship or limitations on the issuance of passports and visas).

268. See generally *Lawsuit Challenges Unlawful Detention of Asylum-Seekers at Buffalo Immigration Jail*, ACLU (Sept. 26, 2017), <https://www.aclu.org/news/lawsuit-challenges-unlawful-detention-asylum-seekers-buffalo-immigration-jail> [<https://perma.cc/WR49-37K2>].

269. See Plaintiffs' Amended Petition for Writ of Habeas Corpus & Complaint

statistics offered by DHS showing that between January and July 2017, parole grant rates at the Batavia facility plummeted from 50 percent to between 12–14 percent.²⁷⁰ On November 17, 2017, Judge Elizabeth A. Wolford in the Western District of New York granted the petitioners' motion for a preliminary injunction and denied the government's motion to dismiss.²⁷¹ Under the order, asylum seekers are to be given a parole interview with an immigration officer, provided with an explanation for their parole decision, and informed that they can seek reconsideration if parole is initially denied.²⁷² The injunction also provides asylum seekers who have already had their parole denied with the opportunity to have their parole requests readjudicated,²⁷³ and orders bond hearings for those detained at Batavia for six months or more.²⁷⁴ However, unlike the preliminary injunctions that blocked enforcement of the Travel Ban nationwide, Judge Wolford's order is limited to the Western District of New York.²⁷⁵

2. *Increase in Criminal Prosecution of Asylum Seekers as Illegal Entrants and Use of Criminal Prosecution for Immigration Violations to Separate Family Units*

Another enforcement goal set forth in the Border Security Executive Order was increased criminal prosecution for immigration violations.²⁷⁶ Though criminal prosecution for immigration violations has accounted for a large number of total federal prosecutions annually for at least a decade, the Trump Administration has claimed to prioritize the DOJ's efforts to criminally prosecute immigration violations.²⁷⁷

for Declaratory & Injunctive Relief at 23, *Abdi v. Duke*, 2017 WL 5599521 (W.D.N.Y. Nov. 17, 2017) (No. 17-cv-0721-EAW).

270. See Plaintiffs' Memorandum of Law at 5, *Abdi v. Duke*, 2017 WL 5599521 (W.D.N.Y. Nov. 17, 2017) (No. 17-cv-0721-EAW).

271. *Abdi v. Duke*, 2017 WL 5599521, at *29 (W.D.N.Y. Nov. 17, 2017).

272. *Id.* at *28.

273. *Id.*

274. *Id.*

275. See *id.*

276. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

277. While the Trump Administration did prioritize prosecution for immigration violations, the total number of prosecutions and convictions for criminal immigration violations was approximately 14 percent lower in FY 2017 than FY 2016. See *Criminal Immigration Prosecutions Down 14% in FY 2017*, TRAC REPORTS (Dec. 6, 2017), <http://trac.syr.edu/tracreports/crim/494/> [<https://perma.cc/>

After the Bush Administration established the “Operation Streamline” program in 2005,²⁷⁸ criminal prosecution for illegal entry (a federal misdemeanor) and illegal reentry (a federal felony) have accounted for a significant percentage of total annual prosecutions by the DOJ.²⁷⁹ Prosecution for illegal entry and reentry peaked during the Obama Administration with nearly 100,000 criminal convictions in 2013.²⁸⁰ Toward the end of the Obama Administration, between FY 2014 and FY 2016, criminal prosecution of immigration violations decreased²⁸¹ and enforcement focused primarily on prosecuting those who reentered the U.S. after prior removal.²⁸²

On April 11, 2017, several months President Trump signed the Border Security Executive Order, Attorney General Sessions issued

HQ2J-7YDW]. In FY 2017, there were a total of 59,910 prosecutions for criminal immigration violations and in FY 2016 there were a total of 69,636 criminal immigration prosecutions, including 64,297 prosecutions for illegal entry and reentry. *See id.*; *see also Immigration Now 52 Percent of all Federal Immigration Prosecutions*, TRAC REPORTS (Nov. 28, 2016) [hereinafter TRAC REPORT FY 2016], <http://trac.syr.edu/tracreports/crim/446/> [https://perma.cc/7M95-8WVT]. The reduction in the number of prosecutions and convictions for illegal reentry and illegally entry is likely due to the significantly lower number of apprehensions along the southern border in FY 2017. *See supra* note 251 and accompanying text.

278. Operation Streamline was launched in December 2005 by the Bush Administration. *See* Bryan Schatz, *A Day in the “Assembly-Line” Court That Prosecutes 70 Border Crossers in 2 Hours*, MOTHER JONES (July 21, 2017, 6:00 AM), <http://www.motherjones.com/politics/2017/07/a-day-in-the-assembly-line-court-that-sentences-46-border-crossers-in-2-hours/#> [https://perma.cc/5MJ9-KZW5]. Under the program, DHS designated target enforcement areas within a Border Patrol sector and referred virtually all apprehended unauthorized persons in these areas for speedy prosecution for the misdemeanor crime of illegal entry or the felony crime of illegal reentry. *Id.* Since implementation of Operation Streamline, convictions for illegal entry and illegal reentry have skyrocketed, accounting for a majority of federal criminal convictions. *Id.*

279. *See At Nearly 100,000, Immigration Prosecutions Reach All-Time High in FY 2013*, TRAC REPORTS, <http://trac.syr.edu/immigration/reports/336/> [https://perma.cc/P4S7-8G9R] (last visited June 20, 2018).

280. *Id.*

281. *See* TRAC REPORT FY 2016, *supra* note 277.

282. Under previous Administrations, many individuals who were prosecuted after reentry were initially charged with the more serious felony charge of illegal reentry, but were allowed to plead guilty to the reduced charge of illegal entry, a petty misdemeanor. *See Despite Rise in Felony Charges, Most Immigration Convictions Remain Misdemeanors*, TRAC REPORTS, <http://trac.syr.edu/immigration/reports/356/> [https://perma.cc/L9S4-W5UB] (last visited June 20, 2018); *see also* Schatz, *supra* note 278.

a policy memorandum directing federal prosecutors to prioritize prosecution of criminal immigration violations.²⁸³ In particular, the DOJ policy memorandum directed prosecutors to pursue felony charges for those reentering the U.S. and to resume criminal prosecution against first-time entrants.²⁸⁴

In the months following the DOJ policy memorandum, prosecutions for illegal entry and reentry increased dramatically. By May 2017, criminal prosecutions had increased by 27 percent,²⁸⁵ and by June 2017, they had increased by another 18 percent.²⁸⁶ FY 2017 also saw aggressive prosecution of first-time entrants, including asylum seekers.²⁸⁷ Border Patrol often apprehended and referred these entrants to the DOJ for criminal prosecution before the entrants had undergone credible fear screening.²⁸⁸ There were also reports that many individuals who had been criminally convicted for illegal entry were processed for removal by DHS before the individuals were able to present their asylum claim.²⁸⁹

283. Memorandum from Jeff Sessions, Att’y Gen., to all Federal Prosecutors, Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download> [<https://perma.cc/GT5Z-H9YW>].

284. *Id.*; see Astrid Galvan, *More Border Crossers Prosecuted in ‘New Era’ of Enforcement*, CHICAGO TRIB. (Nov. 5, 2017, 1:09 PM), <http://www.chicagotribune.com/news/nationworld/ct-border-crossing-prosecutions-20171105-story.html> [<https://perma.cc/2GT7-DG5K>].

285. *Immigration Prosecutions for May 2017*, TRAC REPORTS, <http://trac.syr.edu/tracreports/bulletins/immigration/monthlymay17/fil/> [<https://perma.cc/95PB-DLDM>] (last visited June 20, 2018) (stating that the number of “new immigration prosecutions . . . is up 26.8 percent over the previous month”).

286. *Immigration Prosecutions for June 2017*, TRAC REPORTS, <https://trac.syr.edu/tracreports/bulletins/immigration/monthlyjun17/fil/> [<https://perma.cc/HM4Q-FZJW>] (last visited June 20, 2018) (“[D]uring June 2017 the government reported 5508 new immigration prosecutions . . . up 18.4 percent over the previous month.”).

287. U.S. CUSTOMS & BORDER PROT., DEP’T OF HOMELAND SEC., U.S. BORDER PATROL’S TUCSON SECTOR PROSECUTING FIRST-TIME OFFENDERS (July 13, 2017), <https://www.cbp.gov/newsroom/local-media-release/us-border-patrol-s-tucson-sector-prosecuting-first-time-offenders> [<https://perma.cc/Z6D6-7JCX>].

288. HUM. RTS. FIRST, THE RISE IN CRIMINAL PROSECUTIONS OF ASYLUM SEEKERS 2 (2017), <http://www.humanrightsfirst.org/sites/default/files/hrf-criminal-prosecution-of-asylum-seekers.pdf> [<https://perma.cc/W9XR-EJNU>] (stating that in Tucson, “clients report having a fear to return to their home countries or intend to seek asylum, but Streamline judges routinely tell attorneys that their clients must first be criminally prosecuted and serve their prison sentences.”).

289. Prosecuting and removing asylum seekers before they have an opportunity to pursue their asylum claims potentially violate the United States’ non-refoulement

Even more troubling, in November 2017, the Houston Chronicle confirmed twenty-two instances in which the DOJ and the DHS used criminal prosecution for immigration violations to separate family units entering the United States to seek asylum.²⁹⁰ Federal public defenders and legal advocates state that this number is likely much higher.²⁹¹ In one case, Nayron Pineda, who fled Venezuela in May 2017 with his wife and fifteen-year-old daughter, handed the Border Patrol agent paperwork to request asylum when he and his family were apprehended.²⁹² Instead of referring their case for a credible fear screening and processing them as a family unit, Mr. Pineda's fifteen-year-old daughter was transferred to ORR custody while he and his wife were prosecuted for illegal entry.²⁹³ After serving their sentence, the couple was transferred to an immigration detention facility to make their case for asylum.²⁹⁴ During this time, Pineda and his wife were denied custody of their daughter, who was eventually released to the custody of her aunt.²⁹⁵

obligations under the 1951 Refugee Convention, and 1967 Protocol that prohibit returning an individual to a country where they would face persecution. *See* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]; Protocol Relating to the Status of Refugees art. 33, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 [hereinafter 1967 Protocol] (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

290. Lomi Kriel, *Trump Moves to End ‘Catch and Release’, Prosecuting Parents and Removing Children who Cross Border*, HOUSTON CHRON. (Nov. 25, 2017) [hereinafter Kriel, *Trump Moves to End ‘Catch and Release’*], <http://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php> [https://perma.cc/S5QE-4S4U].

291. A November 25, 2017 Houston Chronicle story notes that “[f]ederal defense attorneys across the southern border say they are fielding unprecedented requests from migrant clients to find their children.” *Id.* The story also contains quotes from Laura St. John, legal director of the Florence Project, an Arizona nonprofit serving unaccompanied children, noting that St. John’s office had seen nearly 100 cases of parents separated from their minor children when the parents were prosecuted for illegal entry. *Id.*

292. Lomi Kriel, *Streamlined: Trump Pressing for Mass Criminalization of Illegal Border Crossers*, HOUSTON CHRON. (Aug. 25, 2017), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-pressing-for-mass-criminalization-of-11962046.php> [https://perma.cc/VSF4-U2G6].

293. *Id.*

294. *Id.*

295. *Id.*

While it is unclear exactly how widespread the problem is, these anecdotal reports sharply conflict with the DHS policy to not separate family units that then DHS Secretary Kelly announced in April 2017.²⁹⁶

To date, there has been one significant legal challenge to the prosecution of parents apprehended and separated from their minor children. On November 7, 2017, the Federal Public Defender for the Western District of Texas in El Paso, Texas, filed a joint motion on behalf of five defendants to dismiss federal misdemeanor charges for illegal entry.²⁹⁷ In support of their motion, Defendants argued that the government's criminal prosecution of asylum seekers, separation of asylum seekers from their minor children, and failure to process asylum seekers and their children as family units in compliance with the *Flores* settlement, violated their Due Process rights.²⁹⁸ Despite expressing serious concerns about the increased number of defendants prosecuted for misdemeanor illegal entry who were separated from their children at the time of their arrest,²⁹⁹ U.S. Magistrate Judge Miguel Torres denied Defendants' motion to dismiss on November 27, 2017.³⁰⁰ The Federal Public Defender for the Western District of Texas indicated the defendants would appeal the ruling by Judge Torres.³⁰¹

On December 11, 2017, eight organizations filed a formal complaint with the DHS Officer for Civil Rights and Civil Liberties and DHS Inspector General regarding the use of prosecution for illegal reentry to separate family units apprehended at or near the

296. See Kriel, *Trump Moves to End 'Catch and Release'*, *supra* note 290.

297. See Defendants' Motion to Dismiss and Brief in Support Thereof, *United States v. Dominguez Portillo*, No. 17-MJ-4409-MAT (W.D. Tex. Nov. 7, 2007).

298. *Id.* at *3.

299. In his November 1, 2017 Order, U.S. Magistrate Judge Torres noted: The Court, in a number of recent illegal entry cases over the last several months, has repeatedly been apprised of concerns voiced by defense counsel and by defendants regarding their limited and often non-existent lack of information about the well-being and whereabouts of their minor children from whom they were separated at the time of their arrest.

Order for Briefing, *United States v. Dominguez Portillo*, EP-17-MJ-4409-MAT, at *1 (W.D. Tex. Nov. 7, 2017).

300. Lomi Kriel, *El Paso Judge Denies Motion of Immigrant Parents Separated from Children*, HOUSTON CHRON. (Nov. 27, 2017), <http://www.chron.com/news/houston-texas/houston/article/El-Paso-judge-denies-motion-of-immigrant-parents-12387509.php> [<https://perma.cc/TR8S-JRWQ>] (last visited June 20, 2018).

301. *Id.*

U.S.-Mexico border.³⁰² In the complaint, the Florence Immigration and Refugee Rights Project, one of the signatory organizations, identified 155 cases of family separation that had occurred as of late October 2017, with most of these cases occurring during the late summer and fall of 2017.³⁰³ Lutheran Immigration and Refugee Service, another signatory organization that provides temporary shelter and sponsor placement services for unaccompanied minors in ORR custody, also reported a significant increase in minors who were separated from a parent following apprehension at the border in the last quarter of FY 2017.³⁰⁴ These reports from organizations working on the ground to assist family units apprehended at the border indicate that this issue may be more widespread than originally thought.³⁰⁵

3. *Customs and Border Protection and Border Patrol Officers
Turning Away Asylum Seekers at the Southern Border*

While not specifically directed by the Border Security Executive Order, another trend that has emerged involves CBP and Border Patrol agents turning away those who present themselves at the border to request asylum. According to a May 2017 report by Human Rights First, after the election of President Trump and his signing of the Border Security Executive Order, CBP agents have routinely refused to process asylum seekers and, in some cases, claimed the United States is no longer accepting asylum seekers.³⁰⁶

302. The eight organizations that filed the joint formal complaint were: Al Otro Lado, American Immigration Council, American Immigration Lawyers Association, Florence Immigrant and Refugee Rights Project, Kids in Need of Defense, Lutheran Immigration & Refugee Service, Refugee & Immigrant Center for Education & Legal Services, and Women's Refugee Commission. Letter from Al Otro Lado et. al., to Cameron Quinn, Officer for Civil Rights and Civil Liberties, Dept. of Homeland Sec., and John V. Kelly, Acting Inspector General, Dept. of Homeland Sec. (Dec. 11, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/family_separation_complaint.pdf [<https://perma.cc/DG89-SNXE>].

303. *Id.* at 5–6.

304. *Id.* at 6.

305. *Id.* at 18.

306. See B. SHAW DRAKE ET AL., HUM. RTS. FIRST, CROSSING THE LINE: U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS 1 (May 2017), <http://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf> [<https://perma.cc/W48A-UMEJ>].

Some of the reported conduct by CBP and Border Patrol agents is particularly egregious, and indicates that, under the Trump Administration, officers feel emboldened to reject asylum applicants presenting a claim of fear at the border, in violation of both U.S. and international law.³⁰⁷ In several reported cases, CBP and Border Patrol agents have told asylum seekers, “Trump says we don’t have to let you in”³⁰⁸ and, “There’s no asylum here. We’re not granting asylum.”³⁰⁹ In other cases, CBP and Border Patrol agents have threatened to separate parents from their children if they pursue an asylum claim.³¹⁰ According to one attorney representing asylum seekers on the U.S. border near Tijuana, “The tenor of interactions with C.B.P. officers has veered toward the openly hostile following [President Trump’s] election.”³¹¹

On July 12, 2017, the AIC and Center for Constitutional Rights filed a class action lawsuit challenging CBP’s unlawful practice of turning away asylum seekers who present themselves at a port of entry along the U.S.-Mexico border.³¹² In support of their November 13, 2017, motion for class certification, Plaintiffs submitted affidavits from the individual plaintiffs³¹³ and nineteen asylum seekers³¹⁴ who had been turned back by a CBP officer after attempting to apply for asylum at the border. The affidavits detailed unlawful conduct by the

307. The act of turning away an individual seeking protection on account of a well-founded fear of persecution violates INA § 235, which requires the acceptance and processing of asylum seeker with a credible fear of persecution apprehended at the border. *See* INA § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B) (Supp. 2017). It also violates the United States’ treaty obligations under the 1951 Refugee Convention, and the 1967 Protocol. *See* 1951 Refugee Convention, *supra* note 289; 1967 Protocol, *supra* note 289.

308. B. SHAW DRAKE ET. AL., *supra* note 306.

309. Caitlin Dickerson & Miriam Jordan, ‘No Asylum Here’: Some Say U.S. Border Agents Rejected Them, N.Y. TIMES (May 3, 2017), https://www.nytimes.com/2017/05/03/us/asylum-border-customs.html?_r=0 [<http://perma.cc/335C-P7LC>].

310. Richard Gonzalez, *Advocates Say Agents are Unlawfully Turning Away Asylum Seekers at the Border*, NPR NEWS (July 26, 2017, 12:16 PM), <https://www.npr.org/2017/07/26/539496312/advocates-say-agents-are-unlawfully-turning-away-asylum-seekers-at-the-border> [<https://perma.cc/J93H-ZAR2>].

311. Dickerson & Jordan, *supra* note 309.

312. Complaint for Declaratory and Injunctive Relief, at 1–3, *Al Otro Lado v. Duke*, No. 2:17-cv-5111 (C.D.C.A. July 12, 2017).

313. Declaration of Abigail Doe in Support of Plaintiff’s Motion at 1–3, *Al Otro Lado v. Duke*, No. 2:17-cv-5111 (C.D.C.A. Nov. 13, 2017).

314. Declaration in Support of Plaintiff’s Motion at 1–3, *Al Otro Lado v. Duke*, No. 2:17-cv-5111 (C.D.C.A. Nov. 13, 2017).

CBP officers, including falsely representing to individuals that asylum is no longer available in the United States, that asylum seekers need permission from the Mexican government to seek asylum, or that asylum seekers must apply for asylum at other ports of entry.³¹⁵ In the case of one of the individual plaintiffs, she was threatened and falsely told that if she did not abandon her effort to obtain asylum, she would lose custody of her children.³¹⁶ The government's motion to transfer venue to the U.S. District Court for the Southern District of California was granted on November 21, 2017, dismissing all pending motions without prejudice, and requiring Plaintiffs' motion for class certification and the government's motion to dismiss be refiled.³¹⁷ The case is currently pending in the U.S. District Court for the Southern District of California.³¹⁸

While the significant decrease in southern border apprehensions in FY 2017 is likely due in large part to the deterrent effect created by the Border Security Executive Order and Secretary Kelly's comments about separating family units at the border, one cannot help but wonder if CBP's reported turn backs of asylum seekers also contributed to the historically low apprehensions in FY 2017.

4. *Limited Media Coverage of Border Security Enforcement Measures*

Compared to the first Travel Ban, there was virtually no media coverage of the three actions to implement the Border Security Executive Order, described above.³¹⁹ Between January 25, 2017 and December 1, 2017, U.S. news outlets only published thirty-three stories covering the blanket denial of parole and mass detention of asylum seekers under the Border Security Executive Order.³²⁰

315. *Id.*

316. Declaration of Abigail Doe in Support of Plaintiff's Motion, *supra* note 313, at 4.

317. *Challenging Customs and Border Protection's Unlawful Practice of Turning Away Asylum Seekers*, AIC, <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers> [<https://perma.cc/EA8C-Q3W3>] (last visited June 20, 2018).

318. *Case Profile: Al Otro Lado v. Kelly*, CIVIL RIGHTS LITIGATION CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=15991> [<https://perma.cc/WW82-A CQV>] (last visited June 20, 2018).

319. *See supra* Part III.2.B.

320. ProQuest, <https://search.proquest.com/> (follow "Change Databases")

Despite the serious harm caused by increased criminal prosecution of first-time entrants for illegal entry—both individuals and family units seeking asylum—news coverage of this issue was relatively modest. Between April 11, 2017—the date of Attorney General Sessions’ policy memorandum to federal prosecutors—and December 1, 2017, U.S. news outlets published 392 stories on criminal prosecution for illegal entry and illegal reentry.³²¹ The instances of CBP turning back asylum seekers also received limited coverage in the press, with only 135 stories published in U.S. news outlets between January 25, 2017 and December 1, 2017.³²²

IV. CONCLUSION

While there is no direct evidence of causation, evidence suggests a correlation between media coverage, or lack thereof, and litigation challenging the Trump Administration’s executive actions on immigration. One key example of the link between increased media coverage and positive impact on legal challenges to immigration policy is the speed of legal proceedings. As noted above, the first Travel Ban, implemented under intense and pervasive media scrutiny, was halted almost immediately through a series of nationwide injunctions, culminating in a published Ninth Circuit decision upholding the TRO in *Washington v. Trump*.³²³ This decision

hyperlink; then expand “Global Newsstream” and check only “US Newsstream”; then select “Use Selected Database”; then follow “Advanced Search” hyperlink; then type “Border Security” AND “Asylum” AND “Parole” in the first text box (quotations included); then select from the “Publication date” dropdown “Specific date range...”; then enter date range January 25, 2017–December 1, 2017; then select “Search” button) (last visited June 20, 2018).

321. *Id.* (follow “Change Databases” hyperlink; then expand “Global Newsstream” and check only “US Newsstream”; then select “Use Selected Database”; then follow “Advanced Search” hyperlink; then type “Operation Streamline” AND “Prosecution” AND “Illegal Entry” OR “Illegal Reentry” in the first text box (quotations included); then select from the “Publication date” dropdown “Specific date range...”; then enter date range April 11, 2017–December 1, 2017; then select “Search” button) (last visited June 20, 2018).

322. *Id.* (follow “Change Databases” hyperlink; then expand “Global Newsstream” and check only “US Newsstream”; then select “Use Selected Database”; then follow “Advanced Search” hyperlink; then type “Asylum” AND “Turn Back” AND “Border Patrol” in the first text box (quotations not included); then select from the “Publication date” dropdown “Specific date range...”; then enter date range January 25, 2017–December 1, 2017; then select “Search” button) (last visited June 20, 2018).

323. *See supra* Part III.A.2.

was issued a mere two weeks after the Travel Ban was signed by President Trump.³²⁴ By way of comparison, in *Abdi v. Duke*, the case challenging the DHS' blanket policy of denying detained asylum seekers release on parole,³²⁵ District Court Judge Wolford granted Plaintiffs' motion for preliminary injunction approximately two months after it was filed with the court.³²⁶ Additionally, Judge Wolford's order was not a nationwide injunction and only applied to class members detained at the Batavia Detention Facility near Buffalo, New York.³²⁷

In the case of *Al Otro Lado v. Duke*, the class action litigation challenging the rejection of asylum seekers by CBP and Border Patrol agents, Plaintiffs filed their initial complaint on July 12, 2017.³²⁸ On November 21, 2017, Defendants' motion to transfer venue to the U.S. District Court for the Southern District of California was granted, dismissing all pending motions without prejudice, and requiring Plaintiffs' motion for class certification and Defendants' motion to dismiss be refiled.³²⁹ The speed of proceedings has a huge effect on the individuals impacted by the specific executive order or agency action,³³⁰ and available evidence suggests there is a correlation between the amount of media coverage a case receives and the speed of judicial proceedings.³³¹

Even more important is the complimentary role of investigative journalism in identifying unlawful actions by DHS officials and building the factual record supporting a legal cause of action challenging DHS policies. A clear example of this is the investigative reporting by the Houston Chronicle publishing the stories of Central American parents who were separated from their children after being apprehended by CBP agents and prosecuted for illegal entry.³³² This reporting by the Houston Chronicle was cited in the December 11, 2017, formal complaint to the DHS Officer for Civil

324. *See id.*

325. *Abdi v. Duke*, No. 17-cv-721 EAW (W.D.N.Y. Nov. 17, 2017).

326. *See supra* Part III.C.1.

327. *Id.*

328. Complaint for Declaratory and Injunctive Relief, *supra* note 312, at 1–3.

329. *See supra* Part III.C.3.

330. *See supra* Part III.A.3.

331. *See id.*

332. *See supra* Part III.C.2.

Rights and Civil Liberties and DHS Inspector General, and provided key factual background information in support of the complaint.³³³

Directly related to this is the role of media coverage in sparking public outcry in support of or against a particular policy.³³⁴ The widespread publication of the Alan Kurdi photo caused an immediate shift in public attitude surrounding the Syrian Refugee Crisis.³³⁵ Images of chaos at the airports and reports of lawful permanent residents being denied entry into the U.S. sparked nationwide protests and outrage in opposition to the Travel Ban.³³⁶ But if there is limited or no media coverage of the harm caused by government action, the public will not be informed and thus will not be able to demand action from our elected officials to right these wrongs. To prevent ongoing and future abuses against disenfranchised populations, such as immigrants and refugees, it is critical that the press continues to give a voice to the voiceless and illuminate injustice all around us.

The press, attorneys and the public have always played an important role in holding government officials accountable.³³⁷ The unprecedented actions of the Trump Administration have only magnified the importance of these roles.³³⁸ The press must continue to shine a light on actions by our government, attorneys must continue to challenge unlawful actions by our government on behalf of those who have been harmed, and the public must stay engaged and express opposition to actions that threaten the most vulnerable among us.

333. *See id.*

334. *See supra* Part III.B.2.

335. *See supra* Part II.B.

336. *See supra* Part III.A.2.

337. *See supra* Part III.A.3.

338. *See id.*

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