

# United States Senate

August 6, 2020

Mark A. Morgan  
Acting Commissioner  
U.S. Customs and Border Protection  
U.S. Department of Homeland Security  
Washington, D.C. 20528

Dear Acting Commissioner Morgan:

We write with concern regarding U.S. Customs and Border Protection (CBP)'s treatment of unaccompanied children seeking humanitarian protection at the U.S. southern border. In a recent hearing before the Senate Homeland Security and Governmental Affairs Committee (HSGAC), you stated under oath that CBP is screening all unaccompanied children it encounters at the border for human trafficking and other protection concerns. That claim appears inconsistent with evidence indicating that CBP is summarily returning unaccompanied children to dangerous conditions without properly screening them as required by law or, as also required by law, designating eligible children as unaccompanied and transferring them to the custody of the Office of Refugee Resettlement within 72 hours. We therefore urge prompt clarification of your testimony and full compliance with the Trafficking Victims Protection Reauthorization Act (TVPRA).

As you know, in recognition of unaccompanied children's unique vulnerabilities, the TVPRA guarantees them distinct humanitarian safeguards.<sup>1</sup> Specifically, the Act requires CBP to screen all arriving unaccompanied children from contiguous countries to determine, in key part, whether they are victims of human trafficking, at risk of trafficking, or fear return to their home countries. Such children who meet the TVPRA screening criteria must be transferred into the custody of the Department of Health and Human Services Office of Refugee Resettlement (ORR) and placed into full immigration court proceedings—thereby affording them the opportunity to pursue protection from the dangers those screenings helped identify. Similarly, the TVPRA mandates that CBP transfer all arriving unaccompanied children from noncontiguous countries into ORR custody and place them into full court proceedings, whereupon social workers and attorneys may screen them for protection concerns. Taken together, these TVPRA-mandated protocols are vital to uncovering, preventing, and combatting the trafficking, persecution, and other forms of exploitation perpetrated upon children.

When questioned regarding screenings during a June 25 CBP oversight hearing before HSGAC, you testified under oath that CBP is screening all unaccompanied children who arrive to the United States. You further testified that all children subject to your policies implementing the Centers for Disease Control and Prevention (CDC) order under section 362 of the Public Health Service Act, 42 U.S.C. § 265, that limits entry into the United States, have been screened by CBP for trafficking and protection concerns (“they are all screened”). In fact, when asked in a follow-up question if “a hundred percent of these kids were screened for trafficking and protection concerns”, you

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<sup>1</sup> P.L. 110-457.

responded, “Yes, ma’am. Yes, ma’am.” You were soon after asked for clarification and posed the following question: “Regardless of seeing signs [of trafficking], the regulation is that all unaccompanied minors are screened. You are screening all unaccompanied minors, is that what I am understanding?” You responded, “Yes, ma’am.” Yet the available evidence does not support these claims. Numerous media reports show that under Title 42 the Department of Homeland Security (DHS) is swiftly returning arriving unaccompanied children<sup>2</sup> without affording them any TVPRA-mandated protections whatsoever.<sup>3</sup> CBP’s own website states that individuals subject to Title 42 “will *immediately* be expelled.”<sup>4</sup> In June alone, although CBP encountered over 1,650 unaccompanied children, it referred only 61, or less than four percent, of them to ORR.<sup>5</sup> And operational guidance issued to CBP personnel concerning Title 42 expulsions fails to reference, much less require, screenings for unaccompanied children.<sup>6</sup> The guidance’s only provisions relating to humanitarian protection address claims under the United Nations Convention Against Torture and require direct action by CBP personnel only when individuals “make an affirmative, spontaneous, and reasonably believable claim that they fear being tortured in the country they are being sent back to.”<sup>7</sup> It is unclear how an unaccompanied minor seeking protection would be sufficiently aware they need to affirmatively and spontaneously express their fear of torture. The guidance does not address the myriad other protection claims available to these children under U.S. law.

Echoing this guidance, in the U.S. government’s opposition to the plaintiff’s complaint in *J.B.B.C. v. Wolf*—a lawsuit brought in response to DHS’s application of Title 42 to an unaccompanied child—the sole protection screening identified by the government relates to the Convention Against Torture.<sup>8</sup> The government also acknowledges that “CDC did not contemplate that CBP would implement the immigration laws concurrently with the CDC Order.” As such, the Trump Administration appears to have taken the position that, by definition, Title 42 expulsions sweep aside legal safeguards, including TVPRA-mandated screenings and the designation and transfer of eligible unaccompanied children to ORR custody.

The weight of this evidence causes grave concern. Absent screenings and additional legal protections codified in the TVPRA, unaccompanied children—including the more than 2,000

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<sup>2</sup> Dara Lind, “Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law” ProPublica (April 2, 2020); <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

<sup>3</sup> See, e.g., Lauren Villagran, “Despite coronavirus, children are still arriving at the border. They’re being turned away” *El Paso Times* (Jun. 10, 2020); <https://www.elpasotimes.com/story/news/2020/06/10/border-patrol-rejects-migrant-children-cdc-authority-covid-19/5274691002/>.

<sup>4</sup> CBP, “Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions” (Jul. 9, 2020); <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>.

<sup>5</sup> Camilo Montoya-Galvez, “U.S. border expulsions of migrant children continue, with few allowed to seek refuge under virus order” CBS News (July 17, 2020); <https://www.cbsnews.com/news/migrant-children-expelled-under-coronavirus-policy/>.

<sup>6</sup> See CBP, “COVID-19 CAPIO”, <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>.

<sup>7</sup> *Id.*

<sup>8</sup> *J.B.B.C. v. Wolf* (D.D.C. 2020) Defendants’ Opposition to Plaintiff’s Emergency Motion for a Temporary Restraining Order; <https://www.clearinghouse.net/chDocs/public/IM-DC-0077-0004.pdf>.

unaccompanied children returned by DHS under Title 42<sup>9</sup>—have no meaningful opportunity to pursue safety from the dangers they flee. Instead, these children undergo rapid expulsion to situations in Mexico and Central America where they face the prospect of trafficking and other severe harm—precisely the outcomes Congress intended to prevent with the TVPRA.

Additionally, news reports indicate that not only is CBP falling short in screening children and designating them as unaccompanied, but also that CBP is transferring unaccompanied children as young as one year old to U.S. Immigration and Customs Enforcement (ICE), which is holding them in hotels before removing them without allowing them sufficient access to lawyers and Child Advocates.<sup>10</sup> There have also been reports of children being required to sign documents in English, without a translation, and being expelled without explanation of what is happening to them.<sup>11</sup>

In view of the heightened risks facing these children, we request that you clarify your June 25 sworn testimony to HSGAC and provide written answers to the below questions no later than August 14. We also call upon CBP to fully adhere to all TVPRA requirements and to provide a report to our offices by August 21 detailing TVPRA compliance. The safety of these children depends on CBP’s fidelity to the TVPRA.

1. Is CBP screening for trafficking and protection concerns all minors under the age of 18 who arrive at the U.S. border without a parent or legal guardian and who lack lawful immigration status and who are arriving from the contiguous countries of Mexico and Canada, including those minors deemed subject to Title 42?
2. Has CBP expelled under Title 42, any Mexican or Canadian minors under the age of 18 who arrived at the U.S. border without a parent or legal guardian and who lacked lawful immigration status, without screening for trafficking and other protection concerns? Has CBP expelled any minors under the age of 18 who arrived at the U.S. border without a parent or legal guardian who lacked lawful immigration status from non-contiguous countries instead of designating them unaccompanied and admitting them to ORR custody, per TVPRA’s requirements? If so, how many?
3. Please identify, since the CDC order went into effect on March 20, the number of minors who were under the age of 18, arrived without a parent or legal guardian, and lacked lawful immigration status that CBP has categorized under Title 42 versus the number of such minors categorized under Title 8. Please identify, as disaggregated by categorization under Title 42 and Title 8, respectively, the number of these children that CBP: (a) screened for trafficking and other protection concerns; (b) referred to ORR custody; and (c) both screened for trafficking and other protection concerns and subsequently referred to ORR custody.

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<sup>9</sup> Lauren Villagran, “Despite coronavirus, children are still arriving at the border. They’re being turned away” *El Paso Times* (Jun. 10, 2020); <https://www.elpasotimes.com/story/news/2020/06/10/border-patrol-rejects-migrant-children-cdc-authority-covid-19/5274691002/>.

<sup>10</sup> Nomaan Merchant, “Migrant kids held in US hotels, then expelled” Associated Press (July 22, 2020); <https://apnews.com/c9b671b206060f2e9654f0a4eae6388>.

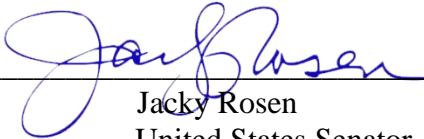
<sup>11</sup> Nomaan Merchant, “Seeking refuge in US, children fleeing danger are expelled” Associated Press (July, 6, 2020); <https://apnews.com/1144b498194cd6b6818acd04d7880e05#:~:text=More%20than%20%2C000%20unaccompanied%20children.anti%2Dtrafficking%20and%20asylum%20laws>.

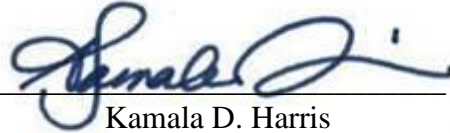
- a. How many of the children processed under Title 8 were later processed under Title 42?
  - b. If minors under the age of 18 who arrived without a parent or legal guardian and lacked lawful immigration status were not screened or admitted to ORR custody in compliance with the TVPRA, please describe the reason why in each instance.
4. Please clarify how CBP is applying the TVPRA's requirements to minors subject to Title 42 who are under the age of 18, arrive at the U.S. border without a parent or legal guardian, and lack lawful immigration status.
5. Please provide a detailed description of the protection screenings, if any, performed by CBP of minors from contiguous countries under the age of 18 who arrive at the U.S. border without a parent or legal guardian and who lack lawful immigration status, including such minors subject to Title 42. In that description, please specify whether CBP is conducting these screenings affirmatively, in what settings it is conducting them, whether it is using Form 93, and what arrangements, if any, it is making to ensure privacy and appropriate language interpretation access. Please also provide copies of:
  - a. Any guidance, policies, or procedures issued to CBP personnel relating to any such screenings;
  - b. Any forms and/or interview questions used as part of any such screenings;
  - c. Any documentation provided to unaccompanied children who go through these screenings; and
  - d. All other documentation relating to any such screenings.
6. What relevant training does CBP provide to personnel who conduct protection screenings of children? Please provide copies of all relevant training materials.
7. Please identify the number of minors expelled under Title 42 who were under the age of 18, arrived at the U.S. border without a parent or legal guardian, and lacked lawful immigration status, both in total and as disaggregated by the minors' country of origin, country of return, age, and sex. Please also provide copies of any guidance, policies, or procedures relating to such children's return under Title 42.
8. In implementing these Title 42 policies, what steps did CBP take to assess the potential detention or holding-related impacts to children, including but not limited to recent reports of children being held in hotels? How many unaccompanied children has CBP transferred to ICE or to an ICE contractor? What is the coordination between CBP and ICE regarding the transfer detention and holding of children that have been subjected to CBP's policies? In each case in which CBP transferred an unaccompanied child to ICE, please provide the age of the child; the number, sex, and ages of other children and adults

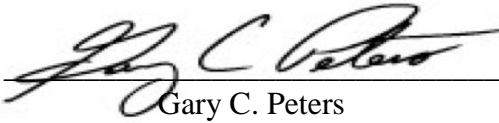
with them; whether the child was able to speak with an attorney, Child Advocate, or parent while in CBP custody. Please provide copies of any documentation unaccompanied children are asked to sign.

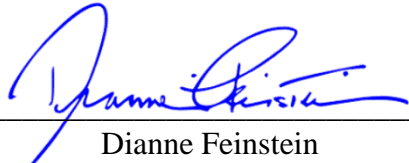
Thank you for your prompt attention to this critical matter.

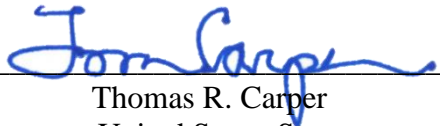
Sincerely,

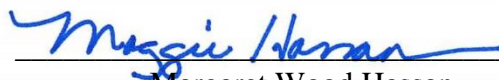
  
\_\_\_\_\_  
Jacky Rosen  
United States Senator

  
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Kamala D. Harris  
United States Senator

  
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Gary C. Peters  
United States Senator


  
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Dianne Feinstein  
United States Senator


  
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Thomas R. Carper  
United States Senator

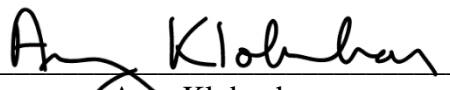
  
\_\_\_\_\_  
Margaret Wood Hassan  
United States Senator

/s/ Patrick Leahy

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Patrick Leahy  
United States Senator

  
\_\_\_\_\_  
Richard J. Durbin  
United States Senator

  
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Sheldon Whitehouse  
United States Senator

  
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Amy Klobuchar  
United States Senator



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Christopher A. Coons  
United States Senator



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Richard Blumenthal  
United States Senator

/s/ Mazie K. Hirono

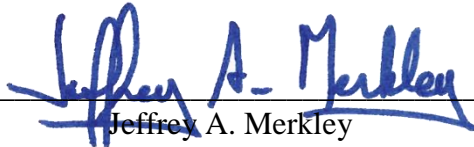
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Mazie K. Hirono  
United States Senator



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Cory A. Booker  
United States Senator



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Jeffrey A. Merkley  
United States Senator



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Catherine Cortez Masto  
United States Senator

/s/ Robert P. Casey, Jr.

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Robert P. Casey, Jr.  
United States Senator



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Edward J. Markey  
United States Senator



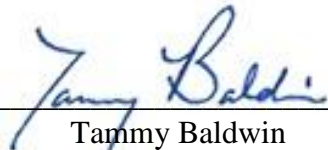
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Kirsten Gillibrand  
United States Senator



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Robert Menendez  
United States Senator




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Tammy Baldwin  
United States Senator



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Ron Wyden  
United States Senator



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Elizabeth Warren  
United States Senator

/s/ Martin Heinrich

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Martin Heinrich  
United States Senator



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Tina Smith  
United States Senator



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Tom Udall  
United States Senator



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Tammy Duckworth  
United States Senator

/s/ Jack Reed

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Jack Reed  
United States Senator



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Sherrod Brown  
United States Senator