

# United States Senate

WASHINGTON, DC 20510

February 5, 2020

The Honorable Michael R. Pompeo  
Secretary of State  
U.S. Department of State  
2201 C Street, NW  
Washington, DC 20037

The Honorable William P. Barr  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

The Honorable Chad F. Wolf  
Acting Secretary of Homeland Security  
U.S. Department of Homeland Security  
3801 Nebraska Avenue, NW  
Washington, DC 20528

Dear Secretary Pompeo, Attorney General Barr, and Acting Secretary Wolf:

We write regarding the “asylum cooperative agreements”<sup>1</sup> (ACAs) that the Department of Homeland Security (DHS) has signed in recent months with Guatemala,<sup>2</sup> El Salvador,<sup>3</sup> and Honduras,<sup>4</sup> countries collectively referred to as the “Northern Triangle.” These agreements outline a framework that could enable the United States to expel asylum seekers to each of these countries, regardless of where the migrants are from or which countries they have transited en

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<sup>1</sup> Sometimes referred to as “safe third country agreements.” U.S. Executive Office for Immigration Review and U.S. Citizenship and Immigration Services, Federal Register Notice, “Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act,” effective November 19, 2019, <https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-25137.pdf>.

<sup>2</sup> U.S. Department of Homeland Security, “Agreement between the Government of the United States and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims,” signed July 26, 2019, <https://www.documentcloud.org/documents/6232982-Signed-Agreement-English.html#document/p1>.

<sup>3</sup> U.S. Department of Homeland Security, “Agreement between the Government of the United States and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims,” signed September 20, 2019, <https://www.documentcloud.org/documents/6427712-US-El-Salvador-Cooperative-Agreement.html>.

<sup>4</sup> U.S. Department of Homeland Security, “Agreement between the Government of the United States and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims,” signed September 25, 2019, <https://ca-times.brightspotcdn.com/47/a5/85ea59444cb89bb2f3eca15880f3/us-honduras-asylum-cooperative-agreement.pdf>.

route to the United States.<sup>5</sup> The Trump Administration's approach to asylum seekers is not only inhumane and potentially illegal; it could also overwhelm the asylum systems of Guatemala, El Salvador, and Honduras and further destabilize those countries. As such, these agreements could have serious and detrimental implications for U.S. national security.

There is significant evidence that the Northern Triangle countries are unlikely to provide safety or adequate protection for asylum seekers, both because of the pervasive violent crime and targeted persecution there as well as their governments' weak or practically non-existent asylum capacities. We are also concerned that expelling asylum seekers under this framework raises serious legal and procedural questions, including the degree to which the Administration complied with relevant law in producing and signing these agreements.

As you know, the Northern Triangle countries have some of the highest homicide rates in the world and are experiencing massive forced displacement both internally and across borders.<sup>6,7,8</sup> The Department of State's own human rights reports for these countries describe the dangers of rape, femicide, forced child labor, and threats against the LGBTQ community.<sup>9</sup> Gang violence is pervasive and often transcends borders; some of these criminal organizations are so dangerous that even some police forces trained to combat gang violence are themselves fleeing to the United States.<sup>10</sup> Despite these troubling facts, on November 21, 2019, the Administration expelled a Honduran man to Guatemala in the first transfer under these agreements.<sup>11</sup>

The Administration has since expelled more than 250 migrants from Honduras and El Salvador to Guatemala.<sup>12</sup> At first, the Administration said it would transfer only single adults.<sup>13</sup> However,

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<sup>5</sup> The agreements do not allow for returning an asylum seeker to the country of their own nationality. But they allow, for example, for a Honduran or a Cameroonian asylum seeker to be deported to Guatemala. U.S. Executive Office for Immigration Review and U.S. Citizenship and Immigration Services, Federal Register Notice, "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act," effective November 19, 2019, <https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-25137.pdf>.

<sup>6</sup> United Nations Office on Drugs and Crime, "Global Study on Homicide 2019," July 2019, <https://www.unodc.org/unodc/en/data-and-analysis/global-study-on-homicide.html>.

<sup>7</sup> United Nations High Commissioner for Refugees, "Global Trends: Forced Displacement in 2018," June 20, 2019, p. 48, <https://www.unhcr.org/en-us/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html>. (In 2018, over 282,000 people from the Northern Triangle countries had asylum applications pending adjudication worldwide)

<sup>8</sup> Internal Displacement Monitoring Centre, "Painting the Full Picture: Persistent data gaps on internal displacement associated with violence in El Salvador, Guatemala and Honduras," November 2019, pp. 10-15, <http://www.internal-displacement.org/publications/painting-the-full-picture-displacement-data-gaps-in-the-ntca>.

<sup>9</sup> U.S. Department of State, "Country Reports on Human Rights Practices for 2018: El Salvador, Guatemala, Honduras," 2018, <https://www.state.gov/report/custom/420abb692c/>.

<sup>10</sup> Washington Post, "It's so dangerous to police MS-13 in El Salvador that officers are fleeing the country," Kevin Sieff, March 3, 2019, [https://www.washingtonpost.com/world/the\\_americas/its-so-dangerous-to-police-ms-13-in-el-salvador-that-officers-are-fleeing-the-country/2019/03/03/e897dbaa-2287-11e9-b5b4-1d18dfb7b084\\_story.html](https://www.washingtonpost.com/world/the_americas/its-so-dangerous-to-police-ms-13-in-el-salvador-that-officers-are-fleeing-the-country/2019/03/03/e897dbaa-2287-11e9-b5b4-1d18dfb7b084_story.html)

<sup>11</sup> Reuters, "Shifting asylum 'burden': U.S. sends Guatemala first Honduran migrant," Sofia Menchu, November 21, 2019, <https://www.reuters.com/article/us-usa-immigration-guatemala/shifting-asylum-burden-us-sends-guatemala-first-honduran-migrant-idUSKBN1XV1WM>.

<sup>12</sup> The Intercept, "One year into 'Remain in Mexico,' the U.S. is enlisting Central America in its crackdown on asylum," Sandra Cuffe, January 29, 2020, <https://theintercept.com/2020/01/29/remain-in-mexico-year-anniversary-central-america/>.

<sup>13</sup> LA Times, "In a first, U.S. starts pushing Central American families seeking asylum to Guatemala," Molly O'Toole, December 10, 2019, <https://www.latimes.com/politics/story/2019-12-10/u-s-starts-pushing-asylum-seeking-families-back-to-guatemala-for-first-time>.

the Administration has begun to transfer children and families, including a Honduran mother with two children who had been hospitalized.<sup>14</sup> Reportedly, many of these migrants are not even aware in advance of the country to which they are being transferred. Upon arrival, they are told that they have 72 hours to either apply for asylum or leave, but are reportedly given practically no information about the process.<sup>15</sup>

Because of the lack of protection offered in Guatemala, El Salvador and Honduras, these agreements raise serious legal questions. On November 18, 2019, the Department of Justice and DHS released an interim final rule (“Rule”) amending departmental regulations in order to implement the ACAs.<sup>16</sup> The Rule, effective November 19, 2019, characterizes the ACAs as “safe third country” agreements as described in the Immigration and Nationality Act, which provides that asylum seekers may be removed under the following conditions:

“[I]f the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien’s nationality or, in the case of an alien having no nationality, the country of the alien’s last habitual residence) in which the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have **access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection**, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.”<sup>17</sup>

The Rule provides that the Attorney General and the Secretary of Homeland Security will make “categorical” determinations as to whether the Northern Triangle countries offer access to a “full and fair procedure” for determining asylum claims. Written information provided to our offices by the Administration indicates that “[t]he Attorney General and Secretary of Homeland Security determined that Guatemala’s asylum system provides full and fair access to individuals seeking protection, as required by U.S. law, prior to the ACA entering into force on November 15.”<sup>18</sup>

The notion that Guatemala or the other two Northern Triangle countries offers such a procedure strains credulity—their systems for determining asylum claims are, at best, deeply flawed and under-resourced, and at worst, practically non-existent. According to the State Department’s human rights reports, in Guatemala, “identification and referral mechanisms for potential asylum seekers were inadequate... [and] migration and police authorities lacked adequate training

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<sup>14</sup> Associated Press, “Advocates: Honduran mother, children deported to Guatemala,” Nomaan Merchant, January 21, 2020, <https://apnews.com/583a7d10644f407e8035e5b6edd1c8f7>.

<sup>15</sup> Washington Post, “The U.S. is putting asylum seekers on planes to Guatemala — often without telling them where they’re going,” Kevin Sieff, January 14, 2020, [https://www.washingtonpost.com/world/the\\_americas/the-us-is-putting-asylum-seekers-on-planes-to-guatemala--often-without-telling-them-where-theyre-going/2020/01/13/0f89a93a-3576-11ea-a1ff-c48c1d59a4a1\\_story.html](https://www.washingtonpost.com/world/the_americas/the-us-is-putting-asylum-seekers-on-planes-to-guatemala--often-without-telling-them-where-theyre-going/2020/01/13/0f89a93a-3576-11ea-a1ff-c48c1d59a4a1_story.html).

<sup>16</sup> U.S. Executive Office for Immigration Review and U.S. Citizenship and Immigration Services, Federal Register Notice, “Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act,” effective November 19, 2019. <https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-25137.pdf>.

<sup>17</sup> 8 USC § 1158(a)(2)(A). Emphasis added.

<sup>18</sup> U.S. Department of State, Answer to Question for the Record to Deputy Secretary of State Nominee Stephen Biegun by Senator Bob Menendez (#235), Submitted November 20, 2019.

concerning the rules for establishing refugee status.”<sup>19</sup> Guatemala does not have a dedicated office for resolving asylum cases; instead, a commission of four officials from several ministries and the immigration department meet a few times a year to decide cases.<sup>20</sup> Reportedly, these officials did not resolve a single case in the first seven months of 2019.<sup>21</sup> Honduras and El Salvador do not have a single full-time asylum officer. By contrast, U.S. Citizenship and Immigration Services has about 500 asylum officers who are currently tasked with adjudicating over 300,000 pending asylum cases.<sup>22</sup> Thus, the Northern Triangle countries are not remotely equipped to fully and fairly handle even a small fraction of these cases.

The lack of asylum capacity poses a grave risk that these Northern Triangle governments will—whether inadvertently or willfully—return asylum seekers to their country of persecution, constituting the serious human rights violation of *refoulement* that is prohibited under Section 208(a)(2)(A) of the U.S. Immigration and Nationality Act.

This provision of U.S. law codifies U.S. obligations prohibiting the return of refugees to a territory where his or her life or freedom would be threatened as a state party to the 1967 Protocol Relating to the Status of Refugees. The ACAs may also violate U.S. obligations as a party to the 1984 Convention against Torture.<sup>23</sup> Indeed, in response to the publication of the Rule, the United Nations High Commissioner for Refugees released a statement, saying it “has serious concerns about the new U.S. policy on asylum,” calling it “an approach at variance with international law that could result in the transfer of highly vulnerable individuals to countries where they may face life-threatening dangers.”<sup>24</sup> A recently filed lawsuit details additional legal violations posed by the implementation of the ACAs.<sup>25</sup>

The ACAs recently signed by DHS appear to have been drafted in haste, with multiple typographical errors introduced into the agreements.<sup>26</sup> There is little sign that they were

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<sup>19</sup> U.S. Department of State, “Country Reports on Human Rights Practices for 2018: El Salvador, Guatemala, Honduras,” 2018, <https://www.state.gov/report/custom/420abb692c/>.

<sup>20</sup> Wall Street Journal, “Asylum Seekers at U.S. Southern Border Can Now Be Sent to Guatemala Instead,” Michelle Hackman and Juan Montes, November 19, 2019, <https://www.wsj.com/articles/asylum-seekers-at-u-s-southern-border-can-now-be-sent-to-guatemala-instead-11574187109>.

<sup>21</sup> Univision News, “Guatemala’s ‘embryonic’ asylum system lacks capacity to serve as safe U.S. partner, experts say,” David C. Adams, August 2, 2019, <https://www.univision.com/univision-news/immigration/guatemalas-embryonic-asylum-system-lacks-capacity-to-serve-as-safe-u-s-partner-experts-say>.

<sup>22</sup> Government Executive, “Homeland Security Says It Will Dramatically Increase Asylum Workforce by Year’s End,” Eric Katz, October 23, 2019, <https://www.govexec.com/workforce/2019/10/homeland-security-says-it-will-dramatically-increase-asylum-workforce-years-end/160828/>.

<sup>23</sup> Protocol Relating to the Status of Refugees, January 31, 1967; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 12, 1984; “Benchbook on International Law,” Diane Marie Amann (ed.), pp. III.E-51, 2014, <https://www.asil.org/sites/default/files/benchbook/humanrights4.pdf>.

<sup>24</sup> UNHCR, “Statement on new U.S. asylum policy,” press release, November 19, 2019, <https://www.unhcr.org/en-us/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html>.

<sup>25</sup> U.T. v. Barr, “Complaint for Declaratory and Injunctive Relief,” United States District Court for the District of Columbia, [https://www.aclu.org/sites/default/files/field\\_document/complaint\\_-\\_u.t.\\_v.\\_barr\\_1\\_15\\_2020.pdf](https://www.aclu.org/sites/default/files/field_document/complaint_-_u.t._v._barr_1_15_2020.pdf).

<sup>26</sup> For example, the agreement with El Salvador refers to “El Salvadornian [*sic*] migration law, although this language is incorrect. A Google search for “El Salvadornian” produces zero results—the most common English-language demonym is “Salvadoran,” though “Salvadorian” and “Salvadorean” are also used. <https://en.wikipedia.org/wiki/Salvadorans>. U.S. Department of Homeland Security, “Agreement between the Government of the United States and the Government of the Republic of El Salvador for Cooperation in the

negotiated in a meaningful way individually with each country. Furthermore, the President's actions leading up to the agreements' signing—including social media statements threatening to withhold, and subsequent withholding of, Congressionally-appropriated aid to the region—indicate that Central American officials may have accepted the terms under duress.<sup>27</sup>

Additionally, one news report indicated that, in a private meeting with President Trump, Secretary Pompeo criticized the agreement with Guatemala, “called the agreement flawed and a mistake,” and told the President that “the Guatemalan government did not have the ability to carry out its terms.”<sup>28</sup> This raises questions about the degree to which the State Department was involved in policy deliberations and decisions underlying these agreements.

Accordingly, please provide answers to the following questions by February 18, 2020:

1. Did any officials within the State Department raise concerns about the feasibility of implementing these ACAs due to the lack of capacity of the Northern Triangle countries' asylum systems, or for any other reason? Please provide any such memoranda or communications in which any such concerns were articulated.
  - a. What specific concerns about the agreement with Guatemala were raised by Secretary Pompeo in the reported Oval Office meeting with the President? Have these concerns been addressed?
2. Were any assessments of the Northern Triangle countries' asylum adjudication procedures made prior to the negotiation or conclusion of the ACAs? Please provide any documents related to any such assessments.
3. The ACAs indicate that the parties shall develop standard operating procedures and plans regarding the implementation of these agreements. What is the status of these plans in each Northern Triangle country?
4. The ACAs indicate that they shall enter into force upon “exchange of notes” indicating that both countries have completed the necessary domestic legal procedures for bringing the agreement into force. Which of the ACAs are in force? Please include copies of any and all records related to this required exchange of notes.
  - a. Reportedly, Honduran officials wanted to delay transfers until both countries “provided notification that they have complied with the legal and institutional conditions necessary for proper implementation of this agreement” but DHS officials wrote that this request read to them as an “escape-hatch not to implement the ACA.”<sup>29</sup> Should this be taken as an indication that DHS considers the ACAs to be in force even in the absence of such “notification” by both countries?

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Examination of Protection Claims,” signed September 20, 2019, p. 2,

<https://www.documentcloud.org/documents/6427712-US-El-Salvador-Cooperative-Agreement.html>.

<sup>27</sup> Politico, “Trump warns of retaliation against Guatemala after immigration deal falls through,” Rishika Dugyala and Sabrina Rodrigues, July 23, 2019, <https://www.politico.com/story/2019/07/23/trump-guatemala-retaliation-immigration-deal-1426722>; NPR, “Trump Froze Aid To Guatemala. Now Programs Are Shutting Down,” Tim McDonnell, September 17, 2019, <https://www.npr.org/sections/goatsandsoda/2019/09/17/761266169/trump-froze-aid-to-guatemala-now-programs-are-shutting-down>.

<sup>28</sup> New York Times, “Trump Officials Argued Over Asylum Deal With Guatemala. Now Both Countries Must Make It Work,” Michael D. Shear and Zolan Kanno-Youngs, August 2, 2019, <https://www.nytimes.com/2019/08/02/us/politics/safe-third-guatemala.html>.

<sup>29</sup> BuzzFeed News, “Trump Wants To Start Deporting Asylum-Seekers To Honduras By January,” Hamed Aleaziz, November 25, 2019, <https://www.buzzfeednews.com/article/hamedaleaziz/asylum-seekers-deportation-honduras-trump>.

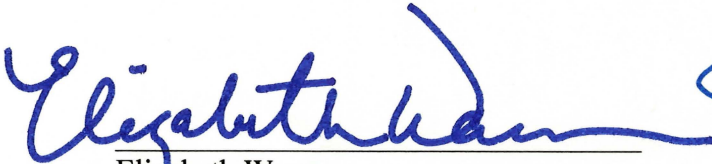
5. The Rule indicates that the Attorney General and the Secretary of Homeland Security will make a categorical determination that each of the Northern Triangle countries offers a “full and fair procedure” for adjudicating asylum claims.
  - a. Which, if any countries have the Attorney General and Secretary of Homeland Security determined do have a “full and fair procedure”? Which, if any countries have the Attorney General and Secretary of Homeland Security determined do not have a “full and fair procedure”? For each country, when were any such determinations reached?
  - b. How are the Attorney General and the Secretary of Homeland Security reaching these determinations? Please provide copies of any determinations made by DOJ and DHS and any related documentation of discussions of this issue.
6. The Rule characterizes the ACAs as “safe third country” agreements as described in the Immigration and Nationality Act. Besides the ACAs, the only “safe third country” agreements signed in the 50 years since the enactment of the Immigration and Nationality Act was the agreement with Canada. Over two years elapsed between December 5, 2002, when that agreement was signed, and December 29, 2004, when it came into force.<sup>30</sup> In contrast, less than four months elapsed between July 26, 2019, when the ACA with Guatemala was signed, and November 15, 2019, when it came into force.
  - a. In the ACA signing ceremony in the Oval Office, Guatemala’s Minister of Interior and Home Affairs said that “Guatemala is definitely clear on the responsibility that it has. We are clear that we have to make changes.”<sup>31</sup> What changes, if any, did Guatemala make to strengthen their asylum procedures in these four months? Please provide any communications between the government of Guatemala and the Administration related to improvements made to Guatemala’s asylum system since the agreement was signed in July.
7. In order to ensure that the United States fulfills its obligations to refrain from sending a person to a place where such person will face harm, what procedures will the Administration follow if asylum seekers face torture, ill treatment, or persecution after being transferred to the Northern Triangle?
8. Is DHS transferring asylum seekers under the ACAs to Northern Triangle countries on the same flights as deportees? How is DHS ensuring that asylum seekers are not transferred in the company of individuals who may threaten their life or freedom after their arrival in country?
9. What, if anything, was promised or offered by U.S. officials to the governments of Guatemala, El Salvador, or Honduras in exchange for their signing onto these agreements?

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<sup>30</sup> “Agreement between the Government of Canada and the Government of the United States of America For cooperation in the examination of refugee status claims from nationals of third countries,” signed December 5, 2002, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html>.

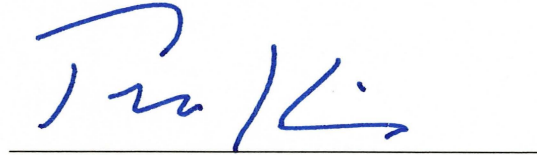
<sup>31</sup> White House, “Remarks by President Trump at Signing of Safe Third Country Agreement with Guatemala,” July 26, 2019, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-safe-third-country-agreement-guatemala/>.

Sincerely,


  
Elizabeth Warren  
United States Senator

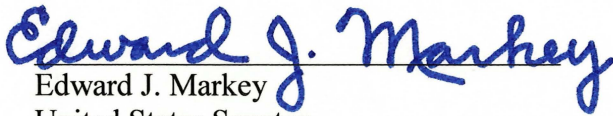
  
Robert Menendez  
United States Senator

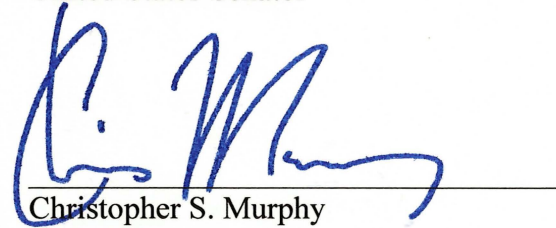
  
Richard Blumenthal  
United States Senator


  
Tim Kaine  
United States Senator

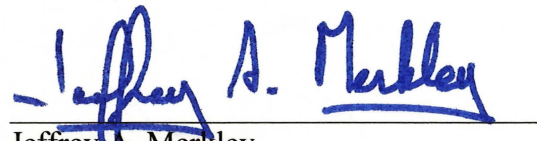
  
Kirsten E. Gillibrand  
United States Senator

  
Benjamin L. Cardin  
United States Senator

  
Edward J. Markey  
United States Senator

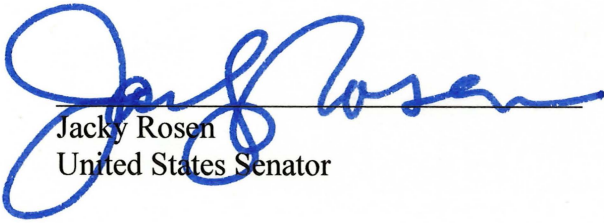
  
Christopher S. Murphy  
United States Senator

  
Bernard Sanders  
United States Senator

  
Jeffrey A. Merkley  
United States Senator

  
Thomas R. Carper  
United States Senator

  
Kamala D. Harris  
United States Senator



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Jacky Rosen  
United States Senator



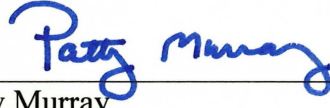
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Cory A. Booker  
United States Senator




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Richard J. Durbin  
United States Senator



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Patty Murray  
United States Senator



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Mazie K. Hirono  
United States Senator



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Catherine Cortez Masto  
United States Senator



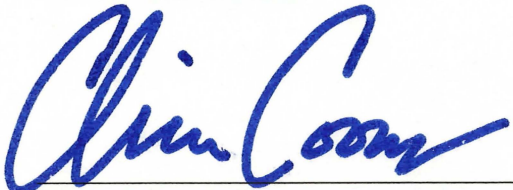
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Amy Klobuchar  
United States Senator



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Jack Reed  
United States Senator



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Christopher A. Coons  
United States Senator