



Language Access Has Life-or-Death Consequences for Migrants

By Tom Jawetz and Scott Shuchart February 2019



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Introduction and summary

In December 2018, two children from indigenous Maya communities in Guatemala died while in U.S. Border Patrol custody. Jakelin Amei Rosmery Caal Maquin, 7, and Felipe Gómez Alonzo, 8, both came to the United States with their fathers, looking to escape impoverished rural communities that have for years been on the receiving end of discrimination and state-sanctioned violence.¹ The deaths occurred within weeks of each other; following both cases, U.S. Department of Homeland Security (DHS) officials sought to shift blame to the children's parents, saying, in part, that they failed to notify Border Patrol agents about the children's need for medical care or specifically declined medical attention. At least one of the fathers disputes these claims.²

Nevertheless, following the second death—Felipe's—DHS announced a change in policy, calling for prompt health screenings of all children in the custody of U.S. Customs and Border Protection (CBP), the parent agency of the Border Patrol. Incredibly, this had not been happening previously.³ To date, however, little attention has been paid to the fact that both families speak indigenous languages—Q'eqchi', in the case of the Caal family, and Chuj, in the case of the Gómez family.*

For decades, the federal government has understood that making its programs accessible for people with limited English proficiency (LEP) is a core civil rights requirement under the law. The need for accurate language assistance increases with the importance of the subject, and screenings regarding health, fear of persecution or torture, or vulnerability to trafficking are critical interactions with government agencies. Yet although DHS comes into contact with the broadest range of foreign-language speakers of any federal agency, it lags far behind in providing real-time interpretation for many of the people placed most at risk when their needs are ignored.

The Border Patrol and CBP unquestionably face real challenges in providing real-time interpretation services for speakers of some languages. But the deaths of Jakelin and Felipe underscore the need for these agencies to be far more proactive in using interpreter services and providing prompt medical screening and assistance that is not dependent on a person's ability to advocate for their own needs in English. The stakes could not be higher, as Congress will soon turn to consideration of CBP funding for fiscal year 2020.

This report first looks at the development of language access as a core civil right. It then discusses the responsibility of the Border Patrol to provide meaningful interpretation and translation services to migrants who speak indigenous languages, detailing the demographics of foreign-language speakers in CBP custody; the frequency and nature of Border Patrol apprehensions and detentions; and the resources available for the Border Patrol to promote language access. The report concludes by offering recommendations that would allow the Border Patrol and CBP to more effectively serve those with no or low English proficiency who come to the United States seeking assistance and protection.

Language access as a core civil right

In Title VI of the landmark Civil Rights Act of 1964, Congress prohibited discrimination on the basis of national origin in all programs receiving federal money.⁴ In 1974, in upholding a federal policy that required school systems receiving federal grants to provide access for English-language learners, the U.S. Supreme Court confirmed that providing meaningful access to programs and activities for people with limited English proficiency is a necessary part of avoiding discrimination based on national origin.⁵

But those legal requirements applied more clearly to outside programs receiving federal grants than to the government's own activities, where nondiscrimination requirements were generally covered by agency-by-agency regulations. In 2000, the Clinton administration issued Executive Order 13166, which—along with contemporaneous guidance from the U.S. Department of Justice (DOJ)⁶—imposed specific planning and substantive requirements on federal agencies to provide appropriate language assistance.⁷

Every agency is charged with taking reasonable steps to provide meaningful access to their programs, services, activities, and benefits—an obligation that extends to enforcement activities performed by an agency such as the Border Patrol.⁸ What steps an agency should take are subject to a test that balances the following four parts: the number, or proportion, of people interacting with the program that would benefit from language assistance; the frequency of that contact; the nature and importance of the program; and the program's available resources. To take two extreme examples, a town that receives a federal grant to run a museum and receives largely English-speaking visitors need not translate its guidebook into Norwegian, but a federally supported 911 service in an area with a high number of Mandarin speakers would be expected to have round-the-clock service in Mandarin. In the second example, contact with a non-English-speaking population is not only frequent but also important to life and health.

The Border Patrol was long a part of the DOJ and thus covered by the department's language access policies. In 2013, however, the agency needed to adopt new policies after becoming part of the newly created Department of Homeland Security—as an arm of CBP. In 2010, the Government Accountability Office expressed serious concern about the DHS' failure to implement Executive Order 13166, noting that seven years after the department was created, it still had not produced a required language access plan.⁹ Finally, in 2012, DHS adopted a language access plan that was developed by its Office for Civil Rights and Civil Liberties.¹⁰

Under this plan, DHS committed to implementing Executive Order 13166 to ensure that all people, regardless of the language they speak, have “meaningful access” to DHS' programs and services, while recognizing that access could not “unduly burden” the department's mission:

It is the policy of DHS to provide meaningful access for individuals with limited English proficiency to operations, services, activities, and programs that support each Homeland Security mission area by providing quality language assistance services in a timely manner. DHS Components, therefore, should incorporate language access considerations into their routine strategic and business planning, identify and translate crucial documents into the most frequently encountered languages, provide interpretive services where appropriate, and educate personnel about language access responsibilities and how to utilize available language access resources.

DHS' plan recognized that the meaningful access requirement could be met by “provision of written materials in multiple languages”—called translation—or orally, “by routine or specially-arranged interpretive or non-English services”—termed interpretation.¹¹

CBP's plan, which covers the Border Patrol and its other constituent agencies and was finalized in 2016, adopts DHS' plan and thereby commits the agency to making “reasonable efforts to provide meaningful access to individuals with limited English proficiency.”¹² Unlike the DHS plan, however, CBP's plan specifically contemplates a protocol for law enforcement personnel who encounter individuals with low English proficiency, including children. Moreover, it describes the Border Patrol's reliance on contract telephonic interpretation services as well as its policy requiring that “all procedures and documents are explained in a language that the individual is familiar with.”¹³

Border Patrol must provide meaningful access to indigenous language speakers in its custody

The Department of Homeland Security's efforts to expand language access have been too little and too late to address the scale of need across the department's operations. The meager resources and planning devoted to this effort have proven particularly inadequate to address the changing demographic makeup of migrants encountered by Border Patrol agents at the southern border. Under the four-part test described above for determining people's need for language assistance, it is clear that the Border Patrol must do much more to satisfy the requirement that it take all reasonable steps toward providing meaningful access for speakers of Latin American indigenous languages.

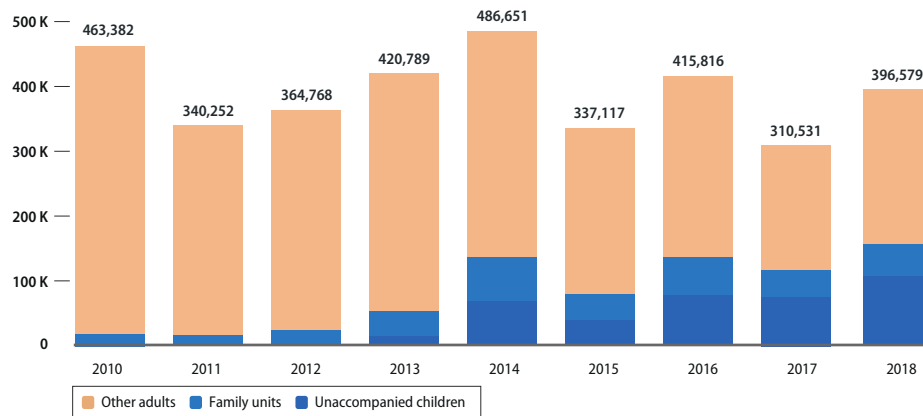
The following sections go through the four-part test to explain the flaws in the Border Patrol's current language access efforts:

Number or proportion of foreign-language speakers

Over the past decade, the United States has seen a marked decline in apprehensions of working-age, mostly Mexican, Spanish-speaking males crossing the southern border and an increase in apprehensions of families and children—particularly from the Northern Triangle countries of Guatemala, Honduras, and El Salvador. By the time they arrive in Border Patrol custody, many of these individuals have traveled long distances under dangerous circumstances and are frequently in search of humanitarian protection.

The figure and table below illustrate these trends. Over the past decade, the proportion of those apprehended by the Border Patrol from the Northern Triangle has risen from only 6 percent in 2007 to more than half of all the agency's apprehensions in 2017. As the countries of origin have shifted, the Border Patrol has encountered a greater proportion of people who are children or in families, while apprehensions of single adults have leveled off or declined.

FIGURE 1
Border Patrol apprehensions, by fiscal year



Note: Family units includes apprehensions of at least one adult and one minor child.

Source: U.S. Customs and Border Protection, "Southwest Migration FY2018," available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018> (last accessed January 2019); U.S. Customs and Border Protection, "Southwest Border Migration FY2019," available at <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last accessed January 2019); and U.S. Customs and Border Protection, "Stats and Summaries," at <https://www.cbp.gov/newsroom/media-resources/stats> (last accessed January 2019).

TABLE 1
U.S. Border Patrol apprehensions, by nationality

Adults and minors

Fiscal year	Apprehensions of Northern Triangle nationals	All Border Patrol apprehensions	Northern Triangle percentage
2007	54,357	876,704	6%
2008	48,425	723,825	7%
2009	41,975	556,041	8%
2010	45,709	463,382	10%
2011	42,132	340,252	12%
2012	88,315	364,768	24%
2013	138,706	420,789	33%
2014	239,229	486,651	49%
2015	134,572	337,117	40%
2016	200,666	415,816	48%
2017	164,718	310,531	53%

Source: U.S. Border Patrol, Nationwide Apprehensions by Citizenship and Sector FY2007-2017 (2018), available at <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jul/usbp-nationwide-apps-sector-citizenship-fy07-fy17.pdf>.

Many of these migrants primarily speak an indigenous language—in other words, one descended from the pre-Colombian languages of the area that were spoken across the Maya empire and other indigenous civilizations. In particular, Guatemalans made up nearly half of the children and families apprehended by the Border Patrol last year; and ethnographers estimate that 40 percent of Guatemalans speak an indigenous language. Furthermore, 7 percent of the total Guatemalan population only speaks an indigenous language and therefore does not speak Spanish as a first or second language.¹⁴

These indigenous languages—K'iche', Mam, Ixil, Chuj, Q'anjob'al, Q'eqchi', and many others—are spoken in an array of dialects, many of which are not understood by speakers of another. Moreover, many speakers of these languages are neither able to read nor write in their indigenous language or in Spanish.¹⁵ In some areas, working-age men may have learned some functional Spanish outside of the village, but knowledge of Spanish or other languages can be spotty—particularly among female migrants. And because indigenous peoples have long been treated as lower status and subjected to persecution and discrimination in their homelands, these migrants may be conditioned not to be forthcoming about their language needs.¹⁶

Frequency of contact

Encounters with migrants happen daily across the Border Patrol's operational environment. The agency comes into contact with migrants at all stages of its activities, from the first encounters between agents and migrants in the field or at Border Patrol stations all the way to migrants' eventual transfer to another government agency.

Nature and importance of Border Patrol apprehensions and detentions

It is not an exaggeration to say that encounters with the Border Patrol can be matters of life and death for migrants, particularly as the agency increasingly arrests and detains exhausted children and families who have sought out agents in order to surrender and make a claim for asylum. (see Figure 1 and Table 1) Such individuals are typically held in small outposts for hours or days. At best, these facilities are similar to small-town police stations; at worst, they are more like field-deployment sheds for a military unit or an oil explorer. CBP Commissioner Kevin McAleenan has acknowledged that this situation is completely inappropriate.¹⁷

For years, the Border Patrol's standard procedure following such arrests was not to conduct careful medical intakes, but instead to assess only for clear medical emergencies.¹⁸ According to a recent study published by the Center for Migration Studies, of deported migrants surveyed, more than 1 in 3 who needed and requested

medical care were denied it.¹⁹ Of survey respondents, indigenous-language speakers reported receiving medical care in Border Patrol custody at just two-thirds the rate of other detainees—a conservative finding since surveys were conducted only in English and Spanish and not with monolingual speakers of indigenous languages.

Too often, migrants are taken to unsafe, unsanitary, crowded facilities that are no place for children, much less sick children or children with other medical needs. Moreover, until recently, these migrants' medical needs were not assessed until days later, if at all, upon admission to a family detention facility operated by U.S. Immigration and Customs Enforcement (ICE) or a shelter operated by the U.S. Department of Health and Human Services. In that dangerous environment, the Border Patrol counts on detainees to advocate for themselves in the event of a medical need. But self-advocacy requires the ability to communicate effectively—the very barrier that speakers of indigenous languages have no way to cross without substantial, proactive assistance from the Border Patrol.

Available resources

There are two senses in which the Border Patrol's interpretation resources to provide language access need to be understood. First, CBP's budget is enormous—around \$14 billion in discretionary spending in the last full-year enacted budget, and a request for nearly \$17 billion overall in the president's initial budget proposal for the current fiscal year.²⁰

Second, its available interpretation and translation resources are limited, and interpreting to meet indigenous speakers' needs is a genuine challenge. As noted above, due to discrimination in their homelands, migrants who speak an indigenous language may not express their need for language assistance apart from Spanish, or may appear to understand more Spanish than they do.²¹ For that reason, operational limitations might lead Border Patrol agents to speak to them in Spanish without ensuring comprehension. Even when the need for interpretation into a non-Spanish language is clear, it can be challenging to identify which language—or which dialect of that language—is needed for meaningful communication. This is particularly true for migrants who can neither read their language nor identify it from the poster or brochure of written languages that DHS deploys for that purpose with other populations.²²

Even when a language need has been properly identified, interpreters are scarce—something that immigration courts have also found.²³ While DHS and CBP have contracted with a number of vendors of telephonic interpretation services, interpreters for little-spoken indigenous languages may not be available without several

hours' advance notice. When interpreters are secured, it may emerge that their dialect is too different from the migrant's to enable meaningful communication. Or they may only be bilingual between the migrant's language and Spanish, requiring three-way interpretation—for example, Chuj to Spanish, Spanish to English, and back again. This may mean that the Border Patrol has to find an agent who is fluent in both Spanish and English.

Recommendations

Only after the death of Felipe Gómez Alonzo on Christmas Eve did DHS announce that all children will receive more intensive medical screenings as soon as possible.²⁴ Toward the end of January, CBP was sounding the alarm about a “medical crisis” along the southern border, as evidenced by the more than 2,200 migrants it had transported to hospitals since December 22, 2018.²⁵ Yet given the almost complete lack of health screenings that had taken place prior to that date, as well as the Center for Migration Studies’ findings highlighted above, it is quite likely that people in CBP’s custody have long had serious health needs go undiscovered and untreated and that the current medical crisis is only manifesting because CBP has finally decided that it can no longer afford to look the other way.

Clearly, these enhanced medical screenings and interventions are important actions for DHS to have taken and for Congress to mandate by law going forward, with appropriated funds being directed for this specific requirement.²⁶ But given the disparate treatment that migrants who speak indigenous languages have long received when it comes to the provision of necessary medical care in CBP custody, much more is needed.

The CBP Office of Professional Responsibility, the DHS Office of Inspector General, and members of Congress are all currently investigating the deaths of Jakelin and Felipe.²⁷ These reviews should be conducted as part of a broader inquiry into the care and custody of individuals apprehended by CBP, including the conditions in which they are held, the adequacy of health screenings that are performed, and the timeliness and appropriateness of any medical care that is provided. An important part of both the narrow and broad investigations—and an area in which the Office for Civil Rights and Civil Liberties could play a key role—is how DHS and CBP can better meet their legal obligations to ensure that all individuals with limited English proficiency, including speakers of indigenous languages, have meaningful language support when accessing services and programs.

At a minimum, this must include:

- A proactive assessment of each migrant’s language needs upon their arrival in Border Patrol custody, by officers who are well-trained to identify indigenous language access hurdles—rather than assuming as a default that Spanish is or should be the primary method of communication unless it fails
- Proactive medical assessments—particularly of children and other vulnerable populations upon their arrival in Border Patrol custody—that do not depend on detainees’ ability to identify or communicate their own medical needs
- Development of a dedicated indigenous-languages interpretation facility, either inside DHS or through an effective outside procurement

The Center for American Progress also recommends further steps to ensure that DHS and the Border Patrol are meeting their obligations in regard to language access:

- Comprehensive training across DHS to ensure that officers and agents do not use Spanish to conduct critical communications with indigenous language speakers unless it has been clearly determined that the migrant has sufficient Spanish-language competence to effectively engage
- Greater engagement by the DOJ’s Civil Rights Division in ensuring that DHS is meeting its language access needs, as well as a greater role for DHS’ Office for Civil Rights and Civil Liberties in determining needed resources in activities by the front-line agencies—the CBP Office of Field Operations, the Border Patrol, and ICE
- Greater use of video and in-person interpretation to overcome the limitations of telephonic interactions

DHS and its constituent parts can do more to both protect the vulnerable and fulfill their legal obligations. This would take the form of proactive assessments by the Border Patrol for all those arriving at the border to best assess their language access and medical needs, in conjunction with more training, oversight, and resources to implement DHS’ language access policies.

Conclusion

Even taking into account the challenges that the Border Patrol faces when providing language access, no child should die in custody because the United States cannot adequately treat vulnerable people who come to its borders to request protection. The recommendations laid out in this report represent a commonsense—and importantly, achievable—plan to ensure that all migrants in CBP custody can receive necessary medical care, and that no other children die due to inadequate care.

About the authors

Tom Jawetz is vice president of Immigration Policy at the Center for American Progress. Prior to joining American Progress, he served as chief counsel on the Immigration Subcommittee of the House Judiciary Committee. In that capacity, Jawetz devised and executed strategies for immigration-related hearings and markups before the Committee on the Judiciary as well as legislation on the House floor. Prior to his time at the Judiciary Committee, Jawetz worked as the immigration detention staff attorney at the National Prison Project, a part of the American Civil Liberties Union (ACLU). He previously represented asylum seekers in judicial and administrative proceedings with the Washington Lawyer's Committee for Civil Rights and Urban Affairs and served as a law clerk to the Honorable Kimba M. Wood of the U.S. District Court for the Southern District of New York.

Scott Shuchart is a senior fellow at the Center. From 2010 to 2018, he was the senior adviser to the Officer for Civil Rights and Civil Liberties at DHS, where he worked extensively on immigration enforcement, detention and custody, and border security, with an emphasis on data-driven analysis to identify civil rights and civil liberties violations. While at DHS, Shuchart led efforts to ensure that ICE's Secure Communities initiative and other programs respected civil rights and avoided racial profiling. Prior to joining the federal government, Shuchart was a litigator at Altshuler Berzon LLP in San Francisco and Boies Schiller and Flexner LLP in New York. He then taught at the Yale Law School Supreme Court Advocacy Clinic from 2008 to 2010. From 2003 to 2004, Shuchart clerked for Judge Marsha S. Berzon on the 9th U.S. Circuit Court of Appeals.

Acknowledgments

The authors thank Philip E. Wolgin for his help.

**Correction, February 21, 2019: This report has been updated to correctly state the language spoken by the Caal family.*

Endnotes

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- 20 U.S. Department of Homeland Security, "FY 2019 Budget in Brief" (Washington: 2018), available at <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf>.
- 21 For example, many indigenous-language speakers know basic Spanish vocabulary for everyday words—for example, days of the week or names of cities—and basic responses such as "sí" and "no," which in a harried law enforcement encounter can lead to an impression of greater comprehension than is actually possible across the language barrier. Moreover, due to low levels of literacy in indigenous languages, written translations can be of only limited use in bridging the need.
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