

June 27, 2018

The Honorable Richard C. Shelby, Chairman  
Senate Committee on Appropriations

The Honorable Patrick J. Leahy, Vice Chairman  
Senate Committee on Appropriations

The Honorable Shelley Moore Capito, Chairman  
Senate Committee on Appropriations, Subcommittee on Homeland Security

The Honorable Jon Tester, Ranking Member  
Senate Committee on Appropriations, Subcommittee on Homeland Security

The Honorable Rodney P. Frelinghuysen, Chairman  
House Committee on Appropriations

The Honorable Nita M. Lowey, Ranking Member  
House Committee on Appropriations

Kevin W. Yoder, Chairman  
House Committee on Appropriations, Subcommittee on Homeland Security

Lucille Roybal-Allard, Ranking Member  
House Committee on Appropriations, Subcommittee on Homeland Security

Re: Appropriators must reject DHS's transfer and reprogramming requests into custody operations; DHS's systemic rights abuses and violations of congressionally imposed funding limits and transparency obligations demand greater oversight

Dear Senators Shelby, Leahy, Capito, Tester, and  
Representatives Frelinghuysen, Lowey, Yoder and Roybal-Allard:

Reports indicate that the Department of Homeland Security (DHS) stands poised to approach your Committee with demands for immense sums of reprogrammed and/or transferred funds into its custody operations,<sup>i</sup> asking for forgiveness rather than permission after dramatically overspending its appropriated budget in ways both morally reprehensible and fiscally irresponsible. **We urge you to assert your authority to deny these demands and stem the rights abuses they would fund by imposing consequences for DHS's reckless behavior.**

Now is not the time to treat the appropriations process as business as usual. Immigration detention facilities are filled with parents who have been torn from their children at the border,<sup>ii</sup> the administration is seeking judicial consent to expand the jailing of asylum-seeking families in unlicensed facilities,<sup>iii</sup> and medical negligence continues to result in deaths in custody.<sup>iv</sup> It has been reported that DHS is now contemplating the extraordinary measure of shifting tens of millions of

dollars of funds from the Coast Guard to jail asylum-seeking families during criminal prosecutions for illegal entry.<sup>v</sup> DHS is reported to be in talks with the United States Navy about the construction of tent cities that could hold as many as 47,000 people, eyeing abandoned airfields, a former naval weapons station, and military training facilities.<sup>vi</sup>

Long before these most recent efforts to expand the detention system, DHS proved itself unable and/or unwilling to provide for the safety of those it detains and to responsibly shepherd U.S. taxpayers' dollars. DHS has been warned repeatedly of inappropriate conditions and oversight, abuses, and criminally negligent government conduct in its massive detention system by a vast spectrum of actors—civil society organizations,<sup>vii</sup> DHS's own Inspector General,<sup>viii</sup> the Homeland Security Advisory Council,<sup>ix</sup> the Advisory Committee on Family Residential Centers,<sup>x</sup> and the Government Accountability Office.<sup>xi</sup> Yet DHS has failed to advance any meaningful reform.<sup>xii</sup> And now, the agency is moving to *more than double* its existing bed capacity all for the purpose of implementing an Executive Order that even administration officials agree is almost certain to run afoul of existing law.<sup>xiii</sup>

Under its current leadership, DHS has systemically violated spending limits and reporting obligations in appropriations law and report language. We urge you to consider this recent history as you contemplate anticipated reprogramming and transfer requests. In the mere three months since passage of the Fiscal Year 2018 spending bill, ICE has wildly overspent its appropriated budget for detention operations and systemically violated reporting obligations. Here are only a few examples:

- Flagrant disregard for appropriated funding levels for custody operations: The March 2018 spending bill appropriated sufficient funds to support an average daily population of 40,354 individuals.<sup>xiv</sup> Because the agency had already significantly overspent its previous appropriation, the funded amount should have required the agency to *reduce* the number of detention beds in use to below that number by the end of fiscal year 2018.<sup>xv</sup> Yet a mere two months after the omnibus was signed into law, ICE reported to the media an average daily population of 41,134.<sup>xvi</sup> This number is almost certainly higher today and continuing to grow, given ICE's announcement in early June that it had secured approximately 1,600 beds in Bureau of Prison facilities to use for civil immigration detainees.<sup>xvii</sup>
- Failure to make public a list of detention facilities: The joint explanatory statement accompanying the March 2018 spending bill requires ICE to “make public a full list, updated monthly, of all facilities in use for detention of adults and/or children, including the average daily population, the type of contract, the governing detention standards, and the complement of on board medical and mental health personnel.”<sup>xviii</sup> ICE has not made this list public. Legal service providers endeavoring to provide representation or know your rights presentations to immigrants in detention are forced to resort to google news alerts to figure out where immigrants are held in detention and in what numbers. Faith-based groups interested in establishing visitation programs for asylum seekers and immigrants in detention must rely on word of mouth to identify where the need exists. This level of transparency—a

simple list of facilities—should be the minimum required of a detention system that is so costly and impactful, and it speaks volumes that ICE refuses or is unable to comply with that minimum.

- Failure to abide by reporting requirements regarding inspections and deaths in detention: The 2018 joint explanatory statement also requires ICE to publicly post all final inspections reports within 60 days of the inspection and reports of all in-custody deaths within 30 days.<sup>xxix</sup> Since passage of the bill, ICE has not publicly posted any inspection reports.<sup>xxx</sup> Although there have already been four deaths in detention since the bill’s passage,<sup>xxxi</sup> and more than 30 days has passed in three of the four cases, ICE has posted only cursory press releases announcing the deaths on its website.<sup>xxxii</sup> These failures of transparency are deeply concerning, especially when considered in light of findings by independent medical professionals that egregiously insufficient provision of medical care in ICE custody regularly contributes to unnecessary deaths.<sup>xxxiii</sup>
- Failure to provide congressionally required protections against sexual abuse in custody: The 2018 joint explanatory statement provided a May 22<sup>nd</sup> deadline for ICE to report to Congress its plan to achieve full compliance with the requirements of the Prison Rape Elimination Act (PREA). According to ICE’s own website, however, approximately 10% of those individuals in custody—more than 4,000 people—are jailed in facilities that lack PREA protections.<sup>xxxiv</sup> This constitutes an outright abdication of ICE’s basic obligation to protect those in its custody, made more alarming by recent revelations that more than 1,000 allegations of sexual abuse in ICE custody were filed between 2010 and 2017.<sup>xxxv</sup>
- Widespread disregard for congressionally imposed obligations regarding detainee access to phones, counsel, and visitation services: In addition to reporting obligations, the 2018 joint explanatory statement instructs ICE to take several basic steps to ensure access to legal and social services while in detention. These obligations include, for example, the provision of “independent and timely access to all facilities for the purpose of providing representation, legal education, and programming, and for purposes of monitoring and visitation....” ICE’s violations of the spirit and letter of these obligations are systemic. The undersigned organizations can attest through our own experiences and reports received from colleagues that immigration attorneys are regularly unable to reach their detained clients by phone, and organizations attempting to provide visitation and/or legal orientation programming are chronically stymied in their efforts by ICE either flat-out rejecting access or putting onerous restrictions on access. Two specific examples illustrate this system-wide problem:
  - In May 2018, ICE denied the request of a group of 40 volunteers associated with the non-profit organization Freedom for Immigrants to provide regular visitation programming at the Plymouth County Correctional Center in Massachusetts. The group had been requesting access for visitation via emails and voicemails since November 2017 and was finally denied access via a phone conversation with a

representative of ICE's Boston Field Office. No reason was provided for the denial.<sup>xxvi</sup>

- A religiously affiliated organization, the D.C. Detention Visitation Network, has been requesting access to provide visitation to people detained in the Immigration Centers of America detention center in Farmville, Virginia for more than a year. On March 29, 2018, ICE's Community Relations Officer for the Fairfax Field Office emailed the group with a formal denial of access to the facility, with no reason provided for the denial.

This list represents the tip of the iceberg; DHS's abuse of power in the operation and management of its detention system goes deep. Your Committee has the authority and the legal and moral obligation to stop the commission of further abuses by DHS.

**We urge you to immediately:**

- 1. Deny all requests for the reprogramming or transfer of funds into ICE's detention and enforcement accounts;**
- 2. Implement stronger and more effective oversight mechanisms to hold DHS accountable to congressionally imposed limits; and**
- 3. Cut funds for enforcement and detention operations for Fiscal Year 2019.**

With questions or concerns, please contact Heidi Altman at the National Immigrant Justice Center at 312-718-5021 or [haltman@heartlandalliance.org](mailto:haltman@heartlandalliance.org).

Sincerely,

American Civil Liberties Union  
American Immigration Lawyers Association  
American Immigration Council  
Center for American Progress  
Detention Watch Network  
Human Rights Watch  
Immigrant Legal Resource Center  
National Immigrant Justice Center  
National Latina Institute for Reproductive Health  
Open the Government  
Project on Government Oversight  
Women's Refugee Commission

CC:

John Kelly, Acting Inspector General  
Office of Inspector General, Department of Homeland Security

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<sup>i</sup> Section 503 of Title V of the [Department of Homeland Security Appropriations Act of 2018](#), Public Law No. 115-141, places limits on the transfer and reprogramming of funds within the Department. Generally, the Act limits the transfer of funds from no more than 5 percent of any one program’s budget to augment existing programs in an amount no greater than \$5,000,000 or 10 percent of another program’s budget, whichever is less. However, this same provision prohibits the use of transferred funds for the increase of funds “for any program, project, or activity for which funds have been denied or restricted by Congress.”

<sup>ii</sup> Tal Kopan, CNN, [“DHS: 2,000 children separated from parents at border.”](#) June 16, 2018.

<sup>iii</sup> [Defendant’s Memorandum of Points and Authorities](#) in Support of *Ex Parte* Application for Relief from the Flores Settlement, *Flores v. Sessions*, Case No. CV 85-4544-DMG (C.D.Cal. June 21, 2018).

<sup>iv</sup> Human Rights Watch *et al.*, [Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention](#) (June 2018).

<sup>v</sup> Dan Lamothe, Washington Post, [“Trump administration plans to use Coast Guard money to pay for border enforcement.”](#) June 22, 2018.

<sup>vi</sup> Philip Elliott and W.J. Hennigan, Time, [“Exclusive: Navy Document Shows Plan to Erect ‘Austere Detention Camps.’”](#) June 22, 2018.

<sup>vii</sup> See, e.g., Detention Watch Network and National Immigrant Justice Center, [Lives in Peril, How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse](#) (2015); National Immigrant Justice Center, [Freedom of Information Act Litigation Reveals Systemic Lack of Accountability in Immigration Detention Contracting](#) (Aug. 2015).

<sup>viii</sup> See, e.g., Department of Homeland Security Office of Inspector General, [OIG-18-32 Concerns about ICE Detainee Treatment and Care at Detention Facilities](#) (Dec. 11, 2017); Department of Homeland Security Office of Inspector General, [OIG-18-53 Immigration and Customs Enforcement Did Not Follow Federal Procurement Guidelines When Contracting for Detention Services](#) (Feb. 21, 2018).

<sup>ix</sup> See Homeland Security Advisory Council, [Report of the Subcommittee on Privatized Immigration Detention Facilities](#) (Dec. 1, 2016).

<sup>x</sup> See Advisory Committee on Family Residential Centers, [Report of the DHS Advisory Committee on Family Residential Centers](#) (Sept. 30, 2016).

<sup>xi</sup> See, e.g., Government Accountability Office, [GAO-16-231 Additional Actions Needed to Strengthen Management and Oversight of Detainee Medical Care](#) (Feb. 29, 2016); Government Accountability Office, [GAO 15-153 Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards](#) (Oct. 10, 2014).

<sup>xii</sup> See U.S. Immigration and Customs Enforcement, *Fiscal Year 2019 Congressional Budget Justification*; see also Human Rights First, [Judge and Jailer: Asylum Seekers Denied Parole in Wake of Trump Executive Order](#) (Sep. 2017).

<sup>xiii</sup> Eliana Johnson, Annie Karni, and Nancy Cook, Politico, [“Hasty immigration order gives way to West Wing tensions.”](#) June 22, 2018.

<sup>xiv</sup> Committee on Appropriations, House Democrats, [FY2018 Omnibus Appropriations Act: Summary of Appropriations Provisions](#) (Mar. 2018).

<sup>xv</sup> *Id.*

<sup>xvi</sup> Sarah N. Lynch, Kristina Cooke, Reuters, [“U.S. sending 1,600 immigration detainees to federal prisons.”](#) June 7, 2018.

<sup>xvii</sup> *Id.*

<sup>xviii</sup> See [Division E](#), Joint Explanatory Statement, [Consolidated Appropriations Act of 2018](#), Public Law No. 115-141

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(incorporating and assigning the same weight to language in the [House Report 115-239](#)).

<sup>xix</sup> *See id.*

<sup>xx</sup> ICE does post some inspection reports on its [online FOIA library](#); the most recent inspection posted is from an inspection of the Cibola County Correctional Center from January 9 – 11, 2018.

<sup>xxi</sup> Since passage of the bill, Mr. Huy Chi Tran passed away on June 12<sup>th</sup>, Ms. Roxana Hernandez on May 25<sup>th</sup>, Mr. Ronald Cruz on May 15<sup>th</sup>, and Mr. Gourgen Mirimanian on April 12<sup>th</sup>. ICE's press releases announcing each of these deaths are maintained on the website of the American Immigration Lawyers Association, [online here](#).

<sup>xxii</sup> ICE posts some of the reports released subsequent to detainee death reviews on its FOIA library, [online here](#).

<sup>xxiii</sup> Human Rights Watch *et al.*, [Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention](#) (June 2018).

<sup>xxiv</sup> *See* U.S. Immigration and Customs Enforcement, [PREA Fact Sheet](#), last accessed June 23, 2018.

<sup>xxv</sup> Alice Speri, *The Intercept*, "[Detained, then Violated: 224 Complaints Reveal a Staggering Pattern of Sexual Abuse in Immigration Detention. Half of Those Accused Worked for ICE.](#)" Apr. 11, 2018.

<sup>xxvi</sup> Written documentation of these two denials is on record with the National Immigrant Justice Center. To view please email Heidi Altman at [haltman@heartlandalliance.org](mailto:haltman@heartlandalliance.org).