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United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, DC 20510-6025

<http://appropriations.senate.gov>

August 23, 2019

The Honorable Kevin McAleenan
Acting Secretary
Department of Homeland Security
Washington, D.C. 20528

Dear Mr. Secretary

This letter responds to the July 26, 2019, notification submitted to the Committee by Ms. Stacy Marcott, Acting Chief Financial Officer of the Department of Homeland Security (DHS) to transfer and reprogram funds to U.S. Immigration and Customs Enforcement (ICE), Operations and Support, to cover the cost of detention beds exceeding the amount appropriated by Congress for fiscal year 2019 and for the cost of providing immigration hearing facilities related to the operation of the Migrant Protection Protocol Program.

The explanatory statement accompanying the annual DHS Appropriations Act clearly states that the reprogramming and transfer authority provided through section 503 is to respond to unforeseen events and circumstances. Since its creation, DHS has traditionally used its limited reprogramming and transfer authority to make non-controversial and technical adjustments to programs, projects, and activities. Significant augmentations of a program have been and should continue to be dealt with through the annual appropriations process or through supplemental spending requests, where the views of all Members can be heard and debated.

In the case of ICE spending for detention beds, Congress provided the highest ever funding level in the DHS Appropriations Act for fiscal year 2019, but lower than the amount requested by the Administration. The Administration again sought additional ICE detention resources in the fiscal year 2019 emergency supplemental, but Congress, after due deliberation and awareness of existing bed levels, decided not to fund the request. These Appropriations Acts, P.L. 116-6 and P.L. 116-26, were enacted with significant bipartisan support and signed into law by the President. Therefore, given that the additional ICE detention resources proposed in this notification were previously requested and not enacted through the annual appropriations process or through the recently passed emergency supplemental, it would be inappropriate for the Department to circumvent the will of Congress using transfer authority that is available only for unforeseen and extraordinary events and has been traditionally used for non-controversial and technical adjustments.

In addition, ICE failed in its responsibility to appropriately manage the resources provided by Congress, especially during the government shutdown, and prioritize detention decisions. The explanatory statement accompanying Public Law 116-6 required submission of a detailed plan on ICE budget execution within 60 days of enactment, and monthly briefings thereafter. The initial plan

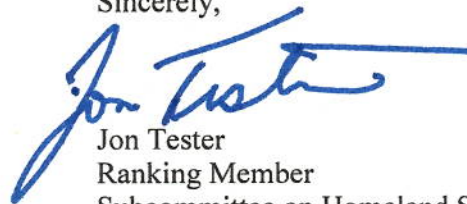
was due April 16, 2019, but it has yet to be received. It is difficult for Congress to assess a request for additional bed funding when the Department is unable to detail how it is executing funds it has already been provided.

Further, to pay for higher detention levels, the transfer notification proposes to shift \$116,000,000 from operational agencies that have pressing security requirements, including the Coast Guard, Transportation Security Administration (TSA), and Customs and Border Protection (CBP). For CBP, this transfer could potentially hamper passenger and cargo inspections at the border during peak travel times while requiring greater use of anticipated fee revenue entering fiscal year 2020. Funds proposed to be transferred from the Coast Guard could instead be used to address a \$1,000,000,000 backlog in deferred maintenance on aging assets and acquisition requirements for the National Security Cutter. Additionally, funds proposed to be transferred from TSA could instead be used to purchase additional screening equipment for airports, which is necessary to keep pace with continued growth in passenger volume.

Finally, the notification proposes to transfer \$155,000,000 from the Disaster Relief Fund (DRF) to ICE for immigration hearing facilities for Department of Justice (DOJ) judges to hear and adjudicate Migrant Protection Protocol cases for immigrants seeking lawful entry into the United States. Section 503(d) of the annual DHS Appropriations Act prohibits funds from being reprogrammed or transferred between appropriations after June 30, except in extraordinary circumstances that imminently threaten the safety of human life or the protection of property. The transfer of funds for immigration hearing facilities appears to be in violation of this provision as it was transmitted on July 26, 2019, without a substantiated explanation relating to the exception clause in Section 503(d). In addition, with regard to the sources for this proposal, while the Department's notification made assurances that the DRF base is sufficient to support operational needs, this does not account for the potential of new catastrophic events such as wildfires or hurricanes. Further, I am concerned with the precedent of resourcing immigration court facilities with funds from DHS when these facilities are traditionally funded through the Department of Justice (DOJ) Executive Office of Immigration Review. Therefore, such a significant request should be proposed using DOJ resources and considered by the Chairs and Ranking Members of the Commerce, Justice, Science, and Related Agencies Appropriations Subcommittee.

For the reasons described above, I do not concur with the Department's notification submission of July 26, 2019. If a decision is made by the Department to move forward on these matters without the full concurrence of the House and Senate Committees on Appropriations, which has been the longstanding practice, support for maintaining Section 503 authority in future DHS Appropriations Acts will quickly erode.

Sincerely,



Jon Tester
Ranking Member
Subcommittee on Homeland Security