

Congress of the United States

Washington, DC 20515

October 10, 2019

The Honorable Russell Vought
Acting Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Acting Director Vought:

As the Office of Management and Budget (OMB) works with the Department of Homeland Security to execute funds under the Continuing Appropriations Act, 2020 (Division A of Public Law 116–59, hereinafter “CR”), we strongly urge increased discipline and transparency with regard to any exception to the automatic apportionment of funds for U.S. Immigration and Customs Enforcement (ICE) for enforcement and removal operations (ERO).

As you know, Article 1, section 9 of the Constitution provides Congress—and Congress alone—the power of the purse. Legislative Branch authority over the government’s spending priorities is central to a functioning system of checks and balances. For the past three years, exception apportionments have been used to increase funding for enforcement and removal operations above the level commensurate with the prior year appropriation, with little apparent justification or transparency.

The terms and conditions of the CR provide funding through November 21, 2019, at the rate for operations included in the fiscal year 2019 appropriations Act; that authority requires ICE to manage ERO in a way that remains consistent with last year’s levels and does not presuppose the outcome of a negotiated full-year funding bill.

Relatedly, OMB is required under the Antideficiency Act (ADA) to apportion appropriations “to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation” (31 U.S.C. 1512(a)). In addition, section 110 of the CR states that current funding levels “shall be implemented so that only the most limited funding action of that permitted in the Act shall be taken in order to provide for continuation of projects and activities.”

There are long-standing but limited exceptions to these requirements to provide the Administration flexibility—such as through an exception apportionment—to address certain extenuating circumstances. One such exception is to ensure the safety of human life or the protection of property (31 U.S.C. 1342), an exception we understand this Administration used in the past to increase ERO funding above prior year levels during the period of a continuing resolution. Section 123.9 of OMB Circular A-11 stipulates that:

Each request for an exception apportionment must be accompanied by a written justification that includes the legal basis for the request. OMB grants exception apportionment requests only in extraordinary circumstances.

Use of such authority must be reserved for extraordinary circumstances, such as those that are unforeseen or that involve extreme cases of imminent danger, consistent with the ADA. This high threshold for employing this authority is particularly important when Congress has considered but declined to include a specific anomaly providing for additional resources, as most recently was the case when the Administration requested, and Congress declined to provide in Public Law 116-59, an anomaly that would have allowed ICE ERO to maintain a bed level well above what was provided for in Division A of the Consolidated Appropriations Act, 2019. Further, any execution of that authority should be narrowly tailored to mitigate a clearly defined threat or danger. It should not be used to impinge on congressional funding prerogatives in a full year appropriations act, or otherwise advance a political agenda.

Specifically, exception apportionments should not be available to continue a level of immigration enforcement above what the prior year funding level for ICE Operations and Support could support. Even more to the point, exception apportionments must not be used to support an expansion of immigration enforcement during the period of the CR.

Consistent with the law, any exception apportionment provided to the Department of Homeland Security must be limited to truly extraordinary circumstances permitted; fully justified; and narrowly tailored.

Lastly, veritable "extraordinary circumstances" that justify such actions would be concerning to all involved and should be communicated immediately to the Congress so that any necessary legislative response could be considered. Consistent with that concern, the Committee expects that DHS will transmit any request for an exception apportionment under these terms to the House and Senate Committees on Appropriations. OMB should likewise transmit any approval of such a request, whether it be for ICE ERO or any other federal program that relies on discretionary appropriations.

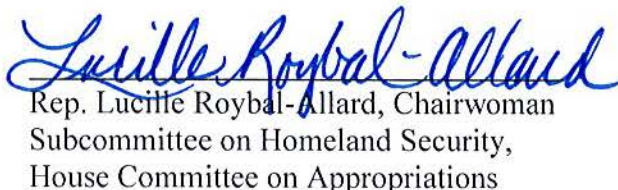
Thank you for your attention to this important matter.



Rep. Nita M. Lowey, Chairwoman
House Committee on Appropriations



Sen. Patrick Leahy, Vice Chairman
Senate Committee on Appropriations



Rep. Lucille Roybal-Allard, Chairwoman
Subcommittee on Homeland Security,
House Committee on Appropriations



Sen. Jon Tester, Ranking Member
Subcommittee on Homeland Security,
Senate Committee on Appropriations

cc: The Honorable Kevin McAleenan, Acting Secretary
Department of Homeland Security