

ICE Lies: Public Deception, Private Profit



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About Detention Watch Network

Detention Watch Network (DWN) is a national coalition of organizations and individuals working to expose and challenge the injustices of the United States' immigration detention and deportation system and advocate for profound change that promotes the rights and dignity of all persons. Founded in 1997 by immigrant rights groups, DWN brings together advocates to unify strategy and build partnerships on a local and national level to end immigration detention.

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About the National Immigrant Justice Center

With offices in Chicago, Indiana, and Washington, D.C., Heartland Alliance's National Immigrant Justice Center (NIJC) is a nongovernmental organization dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers through a unique combination of direct services, policy reform, impact litigation, and public education.

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I. Introduction: ICE's reckless fiscal management of its abusive system of immigration jails

Since its creation, the Department of Homeland Security (DHS)'s immigration enforcement actions have become increasingly capricious. This trend has deepened in the last year with the unapologetic arrests of victims of domestic violence,¹ children in need of emergency medical care,² activists who dared speak out,³ people seeking redress for wage theft,⁴ recipients of Deferred Action for Childhood Arrivals (DACA),⁵ individuals erroneously entered into gang databases who were actually victims of gang violence,⁶ asylum seekers who arrive at the border with their children,⁷ and more. Fueled by anti-immigrant rhetoric coming from the highest levels of government, Immigration and Customs Enforcement (ICE) officers compound these arrests by engaging in blanket refusals to release immigrants from detention during the pendency of deportation proceedings⁸ and persisting in abusive treatment along the entire continuum of immigration enforcement.⁹

Current U.S. immigration policy is driven in large part by the criminalization, scapegoating and targeting of people of color, inflicting trauma on immigrant communities and our society at large. **This report proposes that ICE's patterns of irresponsible governance—including fiscal mismanagement and opacity in detention operations—contribute to a failure of accountability for its ongoing rights violations.** Addressing these good governance concerns would not address all the problems in the system, or even the worst of them, but would constitute a critical first step toward oversight that has been sorely lacking on the part of Congress and independent oversight bodies like the DHS Office of Inspector General.

This report lays out three serious concerns about ICE's governance of the immigration detention system:



1) Misrepresentations of its so-called operational need for detention space;



2) Inflated detention cost estimates and willingness to prioritize the demands of prison contractors over responsible stewardship; and



3) Disregard for congressional oversight.

In response to ICE's reckless actions, Detention Watch Network and the National Immigrant Justice Center recommend that:

1) Congress harness its oversight capacity by denying ICE's irresponsible funding requests and meaningfully enforcing legislative checks on ICE's detention authority;

2) The DHS Office of the Inspector General intensify existing investigations and open new investigations of detention facilities and ICE's contracting, inspections, and costs modeling.



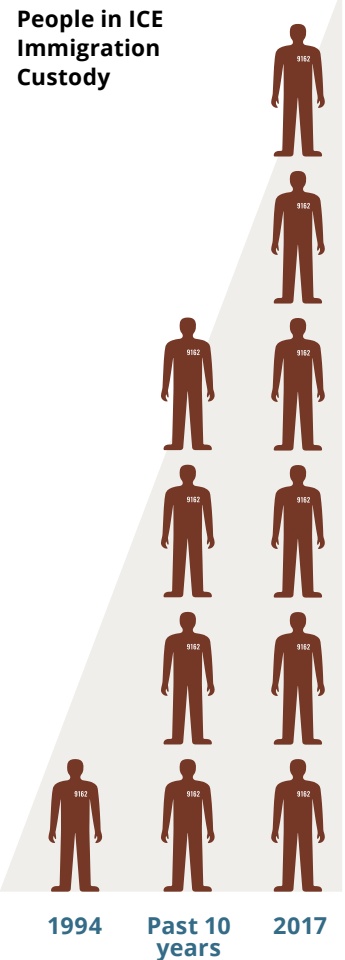
II. ICE artificially inflates its “operational needs.”

The past 25 years have seen an unrelenting expansion of ICE’s network of immigration jails. In 1994, approximately 6,800 people were held in immigration custody on any given day.¹⁰ That number steadily increased over years, hovering between 28,000 and 34,000 for most of the past decade.¹¹ In a rapid spike over the past two years, detention numbers are now at highs previously unimaginable. In fiscal year 2017, ICE jailed a daily average of nearly 40,500 people.¹² The White House has requested increased funding to bring that number above 51,000 in fiscal year 2018.¹³ ICE consistently claims its persistent drive toward expansion is necessitated by operational needs. These claims do not hold up to scrutiny today, nor have they in the past.

Government agencies must justify their annual budget requests in written presentations to Congress. For its requested increase in detention funding for fiscal year 2018, ICE’s written justification relied on the expectation that the White House’s January 2017 Executive Order on interior immigration enforcement would lead to an increase in the average detention population.¹⁴ Nowhere does the Executive Order¹⁵ or the memo implementing it¹⁶ explicitly call for increased detention capacity. Rather, the Executive Order designates new categories of immigrants residing in the United States as priorities for removal while precluding ICE from “exempt[ing] classes or categories of removable [immigrants] from potential enforcement.”¹⁷ In its budget justification, ICE jumps to the conclusion that these changes in policy will lead to two relevant trends: 1) an increase in arrests, charging documents, and detainers issued against immigrants residing in the United States; and 2) an increase in the average length of stay in detention due to the more complex deportation defenses presented by long-time residents.¹⁸

ICE’s claimed justifications for detention expansion are baseless. Even in light of the January Executive Order, the agency continues to maintain *complete discretion* over the breadth of its enforcement activities, including the number of people arrested and the decision to detain or release individuals pending their immigration court proceedings. In no way does the Executive Order or its implementing memo require ICE to arrest and detain more

people or to hold them for longer. Rather, ICE is choosing to engage in massive interior enforcement operations targeting long-time community residents¹⁹ while quietly shifting toward a policy of de facto mandatory detention for all asylum seekers.²⁰ ICE then presents these skyrocketing numbers to Congress and asserts an operational need for detention beds. Even



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as American infrastructure needs go ignored²¹ and health care providers lack vital funds to treat victims of the opioid epidemic,²² ICE begs for billions of new taxpayer dollars to fund a need that doesn't exist. There is no reason that immigrants and asylum seekers who for decades have lived safely and productively in our communities must now be imprisoned.

A recent example of ICE's manipulation of the budget process occurred in September, when agency leaks revealed that ICE was planning a massive nationwide enforcement operation that would have been historic in size, called "Operation Mega" and intended to target 8,400 immigrants.²³ Immediately after the news went public, ICE announced that the operation had been postponed due to Hurricanes Harvey and Irma.²⁴ Had it occurred, the operation would have jumped the number of those detained from approximately 38,000 to a figure much closer to the 51,000 requested by the White House for fiscal year 2018, only weeks before the end of the fiscal year and just as congressional appropriators negotiated the 2018 spending bill. The timing and numbers strongly suggest that ICE was using this operation to artificially inflate the number of those in its custody—to "goose" its detention numbers, as Politico reported—for the purpose of presenting a larger "operational need" estimate in end-of-year appropriations negotiations.²⁵



Alonso Yáñez/La Opinión



III. ICE manipulates its bed costs, benefiting detention contractors and endangering immigrants.

ICE's continued requests for more money—and claims to congressional appropriators that its costs are rising—all come while ICE aggressively seeks to weaken the standards that govern immigration detention.²⁶ This drive to weaken standards is not surprising given ICE's reliance on the private prison industry for the growth and maintenance of the immigration detention system, with at least 65 percent of all immigration jails operated by for-profit companies.²⁷ The remainder of ICE's detention system relies on partnerships with local jails that were never intended for this purpose and therefore struggle to meet existing standards. ICE has long claimed that the most recent and robust set of detention standards are costly for private prison companies and county jails to implement. Given these perverse financial incentives, an increase in funding from Congress will mean increasing profit margins for detention contractors while conditions become even more dangerous for immigrants.



Noting this drive to weaken standards, ICE's claims of rising costs are suspect, particularly when used as a justification for increased funding. It is well documented that for-profit private prison companies already cut corners to drive *down* costs, maximizing profits²⁸ and putting lives at risk.²⁹ Local jails likewise engage in cost-cutting behavior to maximize net

These combined factors of weakening standards, profit-driven and revenue-maximizing contractors, and a seemingly insatiable appetite for increased detention funding should give Congress pause and prompt more thorough investigation into the veracity of claims about increasing costs per detention bed.

revenue from ICE contracts. Furthermore, contracts with local jails often include extremely low per diem payments—some as low at \$30 per day³⁰—raising further questions about claims that costs are rising. These combined factors of weakening standards, profit-driven and revenue-maximizing contractors, and a seemingly insatiable appetite for increased detention funding should give Congress pause and prompt more thorough investigation into the veracity of claims about increasing costs per detention bed.



IV. ICE ignores U.S. law and congressional oversight.

In the instances where Congress has attempted to intervene and provide some much-needed oversight of ICE's detention operations, *ICE has been largely non-compliant or evasive.*

Fiscal mismanagement:

In recent years, Congress has chastised ICE for its chronic fiscal mismanagement but failed to hold the agency accountable for continued bad behavior. In May 2017, Congress passed a supplemental appropriations bill providing ICE with \$2.6 billion to massively increase its detention capacity.³¹ In the bipartisan report language accompanying the bill, Congress took ICE to task for its "lack of fiscal discipline and cavalier management of funding for detention operations."³² Specifically, congressional appropriators noted that ICE's forecasting of its daily population as well as its daily bed rate calculations were not only "unrealistic" but "not based on a validated cost estimation methodology," resulting in forecasting that had "missed the mark by wide margins" for several years.³³

Having provided supplemental funding, Congress nonetheless warned ICE that it was not in fact "funded by an indefinite appropriation," instructing the agency to "manage-to-budget and [not] operate under the false perception that Congress will provide a bail out if financial controls fail or are simply ignored."³⁴ Perhaps unsurprisingly, less than three months later ICE returned to Congress requesting exactly such a bailout—\$91 million in additional funds to be "reprogrammed" toward detention beds.³⁵ Nearly 200 civil society organizations spoke out against this shocking display of inhumanity and fiscal irresponsibility.³⁶ The request was nonetheless granted, likely emboldening ICE to continue its pattern of fiscal mismanagement and fueling its expectation of ever-increasing funding.

In addition to its alarming disregard for Congress's concern regarding its absence of budgetary controls, ICE persistently flouts congressional efforts to impose checks on ICE's implementation of detention standards, inspections of facilities' compliance with those standards, and widespread problems with detention contracting.

Detention standards:

Congress has long signaled that ICE needs to improve detention standards across its vast network of over 200 detention facilities, the majority of which are run by contractors. The DHS Appropriations Act of 2017 requires ICE to include the most recent set of immigration detention standards (referred to as the Performance Based National Detention Standards of 2011, or PBNDS 2011) in all new or newly modified detention contracts, with a written justification required in the case of deviation.³⁷ Congress also carried forward a requirement that ICE report on its progress implementing the Prison Rape Elimination Act (PREA) and the PBNDS 2011 standards in general.³⁸

Despite the clear direction from Congress that ICE needs to be making significant progress toward having all facilities be compliant with the requirements of PREA and the most

current version of detention standards, ICE has done neither. A shocking 151 detention facilities—more than three quarters of the facilities in ICE’s detention system—are contracted to the lowest level of detention standards from 2000.³⁹ ICE has also signed or reactivated 54 detention contracts just in the past year requiring these outdated 2000 standards, in direct violation of Congress’s mandate.⁴⁰ NIJC and DWN are unaware of any reporting by ICE to Congress to provide the justification Congress has required for each of these facilities.

Facility Inspections:

Beginning in fiscal year 2009, Congress added report language to the DHS Appropriations bill requiring that ICE terminate contracts for any facility that failed two consecutive inspections.⁴¹ Congress has also required ICE to “provide an update on its oversight of adult and family detention facilities” including “information on the number of detention facility inspections conducted, [and] detailed results of the inspections.”⁴² Congress has made clear its expectation that ICE’s system of detention inspections be meaningful, transparent and, where appropriate, create consequences sufficient to ensure compliance with required standards.

At odds with this mandate, ICE’s inspections regime is woefully inadequate. In an astounding 40 percent of known detention facilities including short- and long-term use, the only inspections conducted are performed by ICE field office or facility staff in a so-called “Organizational Review Self-Assessment” that includes no independent monitoring or review.⁴³ The remainder of the detention facilities are subject to annual inspections by ICE’s own Enforcement and Removal Operations (ERO) division with occasional inspections by the Office of Detention Oversight, an office also housed within ICE. The annual ERO inspections are fundamentally flawed. They are not independent, and often do not include interviews with detained people. They provide advance notice to the facilities and look for the existence of policies rather than evidence that the policies are followed. They often misrepresent conditions inside the facility, for example counting an indoor room with a skylight as outdoor recreation.⁴⁴ Even in the limited instances where inspections do identify violations of standards, ICE rarely imposes corresponding significant consequences.

The stakes couldn’t be higher. A recent review of ICE investigations into deaths in detention found that in nearly half, medical neglect or the violation of medical standards was a contributing, or even causal, factor.⁴⁵ Despite this, in all but one case, the responsible facility passed its inspection immediately before and immediately after the death.⁴⁶ Furthermore, a recent limited series of unannounced spot inspections of ICE facilities conducted by DHS’s Office of the Inspector General revealed the gravity of the problems hidden when ICE inspects itself; in five of the six facilities it inspected the OIG found deficiencies so significant as to undermine ICE’s ability to provide a safe environment for detained individuals.⁴⁷

To compound this, organizations have raised concerns⁴⁸ that ICE is holding final inspection results pending for long periods of time. This undermines the integrity of the inspections regime and prevents failed inspections from triggering the congressionally-mandated consequence of a terminated contract. Information recently obtained through Freedom of Information Action (FOIA) litigation shows that ICE continues to exploit this loophole, with seven results pending for more than three months and an additional 10 pending for more than a year as of July 2017.⁴⁹

Given the life or death implications of these standards, and ICE's own inability or unwillingness to exact consequences, the congressional mandate that ICE stop contracting with facilities with the worst track records is even more important, and ICE's choice to evade meaningfully implementing it even more alarming.

Detention contracting:

Congress has also used the appropriations process to raise concerns about ICE's inconsistent and inadequate contracting practices. In fiscal year 2017, appropriators were uncharacteristically blunt, saying "ICE must also improve its contracting process for detention beds," continuing on to note that ICE has "neither a standard template for contracts nor a consistent method for Field Offices to validate invoices."⁵⁰

Given that the overwhelming majority of detention facilities are operated by contractors, basic contracting practice should be a core competency for ICE.

Instead, the lack of a "standard template" results in widespread poor practice. The contracts for 159 detention facilities do not have expiration dates.⁵¹ Since the process of renewing a contract often offers the best window for addressing chronic problems at a facility or updating standards, the fact that 79 percent of all facilities never go through this process raises questions about the degree to which ICE is actually controlling, or even seeking to control, its contractors.

Taken together, the degree to which ICE has ignored or evaded basic congressional guidance regarding detention standards, inspections and contracting, affirms the picture of an out of control and unaccountable agency. Oversight entities within Congress, as well as independent oversight bodies like the DHS Office of Inspector General and the Government Accountability Office, must take immediate action to address these pervasive concerns.



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V. Recommendations

Congress must:

- 1) Cut rather than expand appropriated funds for immigration enforcement and detention, and deny any subsequent reprogramming requests for additional detention money between appropriation cycles.
- 2) Take steps to meaningfully enforce congressional oversight language through the withholding of funds.

The DHS Office of the Inspector General must:

- 1) Complete and publicly publish the findings of its investigations into ICE's detention contracting and inspections.
- 2) Continue unannounced spot inspections of ICE detention facilities and continue publicly publishing its findings.
- 3) Open investigations into the integrity of ICE cost modeling and bed space forecasting.

VI. Conclusion

ICE's fiscal mismanagement, opacity in custody operations, and unchecked contracting and inspection systems create fertile ground for abuses and rights violations. In a system lacking in the accountability and oversight that are fundamental to basic good governance, the price is paid in human suffering. ICE's bias toward jailing more immigrants and for longer periods—and its willingness to abandon the basic tenets of good governance to support that bias—leads to unnecessary deaths, people struggling for months and years behind bars as their mental and physical health deteriorate, and children needlessly separated from their parents. Addressing these management concerns would not solve the larger issues with criminalizing, scapegoating and targeting immigrant communities, or the existence of an inhumane and unnecessary detention system, but would be one important step forward. ICE's reckless actions, driven by an administration intent on demonizing immigrant communities, have created an imperative for Congress and oversight bodies like the DHS Office of Inspector General to engage in robust and meaningful oversight immediately.

Endnotes

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⁴⁶ *Id.*

⁴⁷ DHS Office of the Inspector General, OIG-18-32: Concerns about ICE Detainee Treatment and Care at Detention Facilities (Dec. 11, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>.

⁴⁸ National Immigrant Justice Center, ICE's Failed Monitoring of Immigration Detention Contracts, September 2016, <https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2016-11/Inspections%20Policy%20Brief%20FINAL2%202016%2010%2003.pdf>.

⁴⁹ See Columns AG-AM for inspection results in the ICE ERO Facility List from July 10, 2017, available online here: <https://www.detentionwatchnetwork.org/sites/default/files/Confidential%20ICE%20ERO%20Facility%20List%2007-10-2017-1-1.xlsx>.

⁵⁰ See page 21 of Division F of the DHS Appropriations Act of 2017, *supra* note 32.

⁵¹ See Column Y in the ICE ERO Facility List from July 10, 2017, available online here: <https://www.detentionwatchnetwork.org/sites/default/files/Confidential%20ICE%20ERO%20Facility%20List%2007-10-2017-1-1.xlsx>.