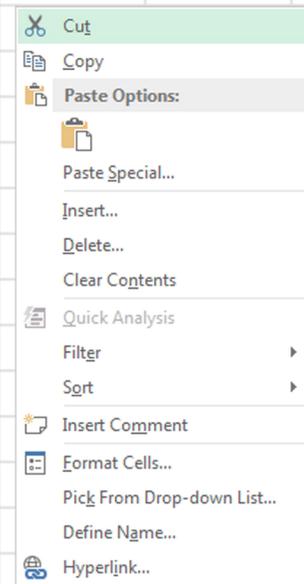


OVERRULED

White House Overrides Department of Homeland Security Budget Request on Border Security Personnel



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EXECUTIVE SUMMARY

The White House Office of Management and Budget (OMB) plays a critical role in the process of developing the President's Budget Proposal each year. The Democratic staff of the Senate Committee on Homeland Security and Governmental Affairs recently obtained a non-public document communicating OMB guidance from the President to the Department of Homeland Security (DHS) regarding its upcoming budget proposal for Fiscal Year (FY) 2019.

At the request of Ranking Member Claire McCaskill, this staff report summarizes budgetary information contained within the document that relates to staffing at DHS. Key findings include:

- A document obtained by the Committee reveals that OMB overruled specific DHS budget requests on a number of personnel issues during the development of the FY 2019 President's Budget proposal.
- OMB instructed DHS to hire 1,000 more new Immigration and Customs Enforcement (ICE) Agents officers than DHS actually requested, raising the total number of new law enforcement personnel ICE must hire in FY 2019 from 1,000 to 2,000.
- In contrast, OMB did not accept DHS's proposed increase in funding for the Office of Field Operations, which employs CBP Officers stationed at ports of entry and has major responsibilities for border security.
- OMB rejected the Department's request for a 2019 pay raise for Border Patrol Agents, ICE Agents, CBP Officers, and other DHS employees, and refused an increase for CBP health benefits. The President's FY 2019 budget proposal will seek a government-wide pay freeze for all civilian federal employees, potentially impacting the Department's ability to recruit and retain qualified employees.

FISCAL YEAR 2019 BUDGET AND POLICY GUIDANCE DOCUMENT

Congress is vested with the power to raise revenue and borrow money under Article I of the U.S. Constitution.¹ Pursuant to 31 U.S.C. § 1105, the President submits a proposed budget of the U.S. government for the following fiscal year no later than the first Monday in February. In a document titled *The Budget of the United States Government*, the President includes budget summaries, information on the activities and functions of the government, and other related financial information.²

The White House Office of Management and Budget (OMB) plays an important role in the process of developing the President's budget. OMB Circular No. A-11 provides extensive information on the preparation and submission of budget requests and justification materials to Congress.³ Federal agencies develop their budgets for the following fiscal year and submit the documentation to OMB, typically in the fall. OMB examiners then review a department's proposed budget and ensure it aligns with the President's priorities. The President's decisions on an agency's proposed budget are communicated to the agency through a process referred to as "passback." OMB communicates guidance responding to an agency's proposed budget request and notifies an agency that particular budgetary line items will or will not receive the amounts requested by the department. At times, OMB provides less money than requested; in other instances it provides more.⁴ A department then has a short time period in which it may appeal OMB's decisions.⁵

In late November 2017, a whistleblower disclosed a critical budget document related to the Department of Homeland Security (DHS) to the Democratic staff of the Senate Homeland Security and Governmental Affairs Committee. This document is titled the *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* and is dated November 28, 2017.⁶ It communicates OMB guidance from the President to the Department regarding its budget proposal. As the document states: "The following document provides fiscal year 2019 discretionary budget and policy guidance for the Department of Homeland Security (DHS). ... The agency-specific discussions found below highlight those programs where budgetary levels reflect explicit changes in Administration policy."⁷ It is important to note that the totals reflected in this document may not represent the President's final budget. Any decisions communicated in this document are appealable and "[a]ppeals to the 2019 guidance, if any, are due by noon on Friday, December 1, 2017 and must be submitted in writing and approved by the Secretary."⁸

Unlike the final President's budget proposals, passback materials are typically not released to Congress or the public. The document disclosed to the Democratic staff of the Committee by the whistleblower is marked "PRE-DECISIONAL – NOT FOR PUBLIC RELEASE."⁹ Despite the secrecy with which the passback is held, this document contains information valuable to the decision making interests of Congress and the public. This document provides an advance indication of the President's likely guidance on FY 2019 funding levels for DHS discretionary resources.¹⁰ Additionally, it provides information on the needs of DHS as developed by the agency itself, independent of White House involvement. Typically, once the President has issued his budget, all departments are expected to publicly support his budget proposal as appropriate policy.

¹ U.S. Constitution, Article I § 9.

² 31 U.S.C. § 1105.

³ OMB Circular No. A-11.

⁴ Shelley Lynne Tomkin, *Inside OMB: Politics and Process in the President's Budget Office* (1998).

⁵ *Id.*

⁶ Office of Management and Budget, *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* (Nov. 28, 2017).

⁷ *Id.* Note that this passback document relates to the FY 2019 budget that will be issued in February 2018, and does not reflect the President's FY 2018 Budget Proposal that Congress has yet to approve.

⁸ *Id.* The Democratic staff of the Committee has not received any materials reflecting DHS appeals.

⁹ Office of Management and Budget, *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* (Nov. 28, 2017).

¹⁰ *Id.*

FUNDING FOR OFFICE OF FIELD OPERATIONS AND CBP OFFICERS AT PORTS OF ENTRY

OMB directed DHS to decrease the budget for Customs and Border Protection's Office of Field Operations by approximately \$88 million from DHS's request.¹¹ The Office of Field Operations (OFO) is one of the three CBP components with law enforcement capabilities, and is the only component responsible for employing officers at ports of entry.¹² While OMB guidance called for additional Border Patrol Agents and Immigration and Customs Enforcement Agents, it is silent on any increase in the number CBP Officers stationed at ports of entry. Although the decrease in funding levels ordered by OMB may not result in reductions in staffing, it is clear that OMB has not prioritized the hiring of new CBP Officers.

CBP Officers at ports of entry and inspection facilities are in many cases the first line of defense in identifying illicit drugs entering the country.¹³ According to the Drug Enforcement Agency (DEA), the majority of illicit drugs that come to the U.S. through the southwest border come in vehicles at ports of entry along the border. The DEA states, "Illicit drugs are smuggled into the United States in concealed compartments within passenger vehicles or commingled with legitimate goods on tractor trailers."¹⁴ This year alone, CBP Officers have confiscated a combined 101,951 pounds of cocaine, methamphetamine and fentanyl this year—the most on record since 2012.¹⁵

In addition to detecting drugs and illicit materials smuggled through land borders and airports, CBP Officers are also responsible for screening mail and other cargo entering the United States. This role is particularly important given the rise of opioids such as fentanyl being sent via the postal service. CBP Officers are also responsible for identifying individuals who may pose national security threats and for preventing them from entering the country via land, sea, and air at 328 ports of entry across the country.¹⁶

Kristjen Nielsen, the Secretary of DHS, has been questioned by this Committee regarding ports of entry. She stated prior to her confirmation:

"Should I be confirmed, I will remain committed to ensuring that the Department is appropriately staffed to meet today's threats and needs. I understand that our ports of entry have experienced significant growth and that staffing likely may need to be adjusted or increased. I commit to meeting with Acting Commissioner McAleenan to ensure that our ports of entry are adequately resourced, and if additional resources required, will work with the Congress to address any deficit."¹⁷

The lack of funding for additional CBP Officers is especially troubling given the fact that staffing is currently too low by over 3,600 positions based on its internal workload staffing model.¹⁸ The current understaffing by over 3,600 positions may compromise the ability of law enforcement to stop illicit drugs,

¹¹ Office of Management and Budget, *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* (Nov. 28, 2017).

¹² Department of Homeland Security, Office of Inspector General, *U.S. Customs and Border Protection's Workload Staffing Model* (OIG-14-117) (July 2014).

¹³ Department of Justice Drug Enforcement Administration, *2016 National Drug Threat Assessment Summary*, DEA-DCT-DIR-001-17 (www.dea.gov/resource-center/2016%20NDTA%20Summary.pdf) (Nov. 2016).

¹⁴ *Id.*

¹⁵ *Under Trump, Drugs are Pouring Across America's Border Like Never Before*, Newsweek (Nov. 25, 2017) (www.newsweek.com/drug-dealers-making-big-runs-across-border-despite-trump-crackdown-722076).

¹⁶ Customs and Border Protection, *Snapshot: A Summary of CBP Facts and Figures* (June 2017) (www.cbp.gov/sites/default/files/assets/documents/2017-Jun/CBP-Snapshot-06012017.pdf).

¹⁷ Senate Committee on Homeland Security and Governmental Affairs, Responses to Questions for the Record, Nomination Hearing for Kirstjen M. Nielsen to be Secretary, United States Department of Homeland Security (Nov. 8, 2017).

¹⁸ Customs and Border Protection, briefing with Senate Homeland Security and Governmental Affairs Committee Minority Staff (December 5, 2017).

goods, and people from entering the United States. It has also meant increased wait times at ports of entry for people and cargo, as well as the repeated, “temporary” assignments of CBP Officers to understaffed ports of entry.

STAFFING LEVELS AT IMMIGRATION AND CUSTOMS ENFORCEMENT

On January 25, 2017, President Donald Trump signed an executive order which called for Immigration and Customs Enforcement (ICE) to hire 10,000 additional ICE Agents.¹⁹ ICE enforces federal laws governing border control, customs, trade and immigration to promote homeland security and public safety.²⁰ For enforcement purposes, ICE’s jurisdiction is the U.S. interior, as opposed to the ports of entry or the border.²¹ ICE’s principal law enforcement components are Homeland Security Investigations and Enforcement and Removal Operations.²²

OMB provided ICE with a total discretionary budget of \$8.08 billion in FY 2019.²³ OMB stated that this funding level “supports key Administration immigration priorities ... such as hiring of 2,000 additional Law Enforcement Officers (LEOs); resources to support that hiring effort will be augmented by United States Citizenship and Immigration Services (USCIS) fees. Additionally, guidance is provided to fund 47,656 beds.”²⁴

The OMB document indicates that hiring at ICE is prioritized to “enable additional enforcement actions within the interior of the United States.”²⁵ OMB instructed the Department to hire more ICE law enforcement officers that the Department originally requested, explaining:

“[T]he Department’s 2019 request supports hiring just 1,000 new [law enforcement officers]. Because of the Administration’s priority to increase the ICE [law enforcement officer] workforce, additional resources are provided ... to hire an additional 1,000 [law enforcement officers] above the Department’s request, for a total hiring goal of 2,000 new law enforcement officers in 2019.”²⁶

In order to ensure the Department is prepared to reach the total hiring goal of 2,000 new law enforcement officers in FY 2019, OMB instructed ICE to provide a briefing by January 15, 2018 on its hiring and staffing plan, mission support and attorney positions.²⁷

OMB provides nearly \$2 billion for the Homeland Security Investigations efforts, including funding to support the hiring of 300 new law enforcement officers in that unit. OMB anticipates these positions “will support the prevention and detection of immigration benefit fraud and the investigatory work necessary to adjudicate applications, including visa overstay and worksite enforcement, if applicable.”²⁸

OMB provided \$1.7 billion for Domestic Investigations, including a program increase of \$13 million to cover the expansion of Visa Security Program locations.²⁹ Enforcement and Removal Operations (ERO)

¹⁹ Exec. Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

²⁰ Immigration and Customs Enforcement, *Who We Are, Overview* (www.ice.gov/about) (accessed Mar. 13, 2017).

²¹ *Id.*

²² *Id.*

²³ Office of Management and Budget, *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* (Nov. 28, 2017).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Office of Management and Budget, *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* (Nov. 28, 2017).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

will be funded at \$5.2 billion, which OMB asserted “includes adequate funding for the annualization of new ERO staff hired in 2018 and supports an additional 1,700 [law enforcement officers] in FY 2019.”³⁰

In order to support the new law enforcement officers in FY 2019, OMB includes \$44 million above the Department's original request to fund additional training and infrastructure.³¹ Additionally, OMB requested ICE to collaborate with DHS components and other federal agencies with a role in the Administration and enforcement of immigration laws to determine how agencies can perform immigration functions more efficiently and effectively.³²

EXISTING STAFF AND IMPACTS OF A PAY FREEZE

OMB intends to issue a pay freeze for federal civilian employees in 2019.³³ OMB has instructed DHS: “Per government-wide guidance, no civilian pay raise is included in the recommended level for the FY 2019 Budget.”³⁴ This pay freeze includes individuals serving in law enforcement positions throughout DHS, with the exception of those in non-civilian positions with the Coast Guard.

DHS employs the largest number of law enforcement officers in the federal government. CBP alone employs over 42,000 officers and agents.³⁵ The thousands of law enforcement officers employed by ICE, CBP, Secret Service, and other DHS components secure our borders, prevent the flow of illicit drugs and goods across into the country, protect our nation from terrorist threats, protect our nation's leaders, and enforce our immigration laws. Despite the Department's request for a pay increase for these individuals, OMB directed DHS to decrease their budget request by millions of dollars in favor of a government-wide pay freeze.³⁶

In addition to issuing a pay freeze for federal civilian employees, OMB rejected DHS's proposed increases for CBP civilian employee health benefits.³⁷

Pay Freeze May Impact Retention

The absence of a pay increase for federal employees, to include federal law enforcement, may present challenges for DHS components wishing to retain qualified employees. Morale and attrition within DHS have long been problems that the Department has struggled to fix.³⁸ For example, between FY 2013 and FY 2016, CBP hired an average of 523 Border Patrol Agents each year. However, during this same period, CBP lost an average of 904 Border Patrol Agents due to attrition each year.³⁹ The implementation of a pay freeze will do little to incentivize law enforcement personnel at DHS components, who already face demanding jobs in often dangerous conditions, to continue their employment with DHS.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Office of Management and Budget, *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* (Nov. 28, 2017).

³⁵ Customs and Border Protection, *Snapshot: A Summary of CBP Facts and Figures* (June 2017) (www.cbp.gov/sites/default/files/assets/documents/2017-Jun/CBP-Snapshot-06012017.pdf).

³⁶ Office of Management and Budget, *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* (Nov. 28, 2017).

³⁷ *Id.*

³⁸ *Id.* The document indicates that OMB is aware that recruiting and retaining the right people is important to achieving mission results across the government. OMB requested DHS to submit additional information on agency recruitment and retention incentives to reward high-performing employees by December 8, 2017.

³⁹ Memorandum from Acting Commissioner Kevin McAleenan to Deputy Secretary Duke, Request for Approval: Executive Order Hiring Surge Plan (Feb. 17, 2017).

The OMB guidance does allow for “the requested \$45.098 million program increase to further Border Patrol relocations and retention incentives.”⁴⁰ However, this will only be helpful for the retention of Border Patrol Agents as opposed to all federal law enforcement, and may only to apply to those individuals in certain regions of the country that historically have had difficulty hiring and retaining personnel.

Pay Freeze May Impact Ability to Meet Hiring Goals

The absence of a pay increase for law enforcement personnel may not allow DHS to remain competitive with other law enforcement agencies with whom they compete for qualified applicants. This is especially true as DHS components have historically struggled to meet hiring mandates.⁴¹

CBP currently employs 19,437 Border Patrol Agents and 23,079 Customs and Border Protection Officers.⁴² Despite these numbers, the Office of Field Operations, which employs CBP Officers at ports of entry, and the Border Patrol are understaffed by thousands of agents and officers. To meet Executive Order hiring goals and current vacancies, the Border Patrol alone would have to hire almost 7,000 agents.⁴³ In contrast, the Office of Field Operations employing CBP Officers would need to hire over 1,100 officers to meet authorized levels and more than an additional 2,500 officers to meet optimal staffing goals based on internal CBP analysis.⁴⁴

Over a four-year span, CBP was unable to fully staff every open position, consistently leaving 3% of its total workforce unfilled.⁴⁵ In the same period, ICE was also unable to fill crucial positions. Eight percent of positions for officers in the Enforcement and Removal Operations were left vacant and eleven percent of positions for officers in the Homeland Security Investigations remained unfilled.⁴⁶ Additionally, the hiring process at these components was extremely delayed, lasting over 200 days.⁴⁷

CBP has explained that it is unable to fully staff itself because it must compete for applicants with employers offering better pay, hours, locations and benefits.⁴⁸ While CBP loses many agents and officers to its sister component, ICE, which boasts better hours and locations, the implementation of a pay freeze may mean that qualified applicants will increasingly look to employers outside the federal government for employment.

Additionally, while OMB approved significant increases to some law enforcement personnel at DHS, it did not approve all funding measures for hiring those individuals. OMB decreased the funding level sought by the Department for recruitment and applicant processing at CBP by \$34

⁴⁰ Office of Management and Budget, *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* (Nov. 28, 2017).

⁴¹ Department of Homeland Security, Office of Inspector General, *DHS is Slow to Hire Law Enforcement Personnel* (OIG-17-05) (Oct. 31, 2016).

⁴² Email from Office of Congressional Affairs, Customs and Border Protection, to Homeland Security and Governmental Affairs Committee Minority Staff (Oct. 20, 2017).

⁴³ This figure includes the 5,000 agents mandated by the President’s Executive Order on border security. The OMB guidance accepted “the agency’s proposal to hire an additional 750 Border Patrol agents in FY 2019 as part of the President’s Executive Order 13767” giving the greenlight to hire 750 of the mandated 5,000 agents in 2019. Email from Office of Congressional Affairs, Customs and Border Protection, to Homeland Security and Governmental Affairs Committee Minority Staff (Oct. 20, 2017); Office of Management and Budget, *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* (Nov. 28, 2017).

⁴⁴ Customs and Border Protection, briefing with Senate Homeland Security and Governmental Affairs Committee Minority Staff (December 5, 2017).

⁴⁵ Department of Homeland Security, Office of the Inspector General, *DHS Is Slow to Hire Law Enforcement Personnel* (OIG-17-05) (Oct. 31, 2016).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Customs and Border Protection, Briefing with Senate Homeland Security and Governmental Affairs Committee Staff (Mar. 16, 2017).

million, setting the budget for these tasks at \$20 million over the previously enacted levels.⁴⁹ While this discrepancy is not as large as some of the other changes suggested by OMB, the shortfall could significantly impact a component that has historically had difficulty meeting staffing targets and that has been directed to increase staffing in a short amount of time.

⁴⁹ Office of Management and Budget, *Department of Homeland Security Fiscal Year 2019 Budget and Policy Guidance* (Nov. 28, 2017).