



Written Statement for the Record

by

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for the

House Committee on Homeland Security
Oversight, Management & Accountability Subcommittee

Hearing On

Oversight of ICE Detention Facilities: Is DHS Doing Enough?

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Dear Committee Members:

Thank you for the opportunity to submit written comments in support of your hearing, “Oversight of ICE Detention Facilities: Is DHS Doing Enough?”

I serve as Senior Counsel for Government Accountability Project, a national non-profit whistleblower protection and advocacy organization founded in 1977. As Congress and the nation have been reminded over the past week with news about the intelligence community whistleblower who used prescribed channels to raise the alarm about serious and urgent issues related to abuses of authority of the highest order, whistleblowers—ethical civil servants who discover information about wrongdoing and choose to disclose those concerns—are one of the best mechanisms to facilitate oversight, promote legal compliance and accountability, and prevent or mitigate serious harm.

My organization currently represents three DHS whistleblowers, Drs. Scott Allen and Pamela McPherson, and attorney Ellen Gallagher, all of whom work or worked for DHS’s Office of Civil Rights and Civil Liberties (CRCL) at the time of their initial disclosures. All three raised concerns about systemic problems in ICE detention facilities: Drs. Allen and McPherson, CRCL’s medical and mental health subject matter experts, raised concerns about the imminent risk of harm posed to children in detention at Family Residential Centers; Ms. Gallagher, as a senior policy advisor in

CRCL's immigration section, blew the whistle with extensive documentation on ICE's widespread use of solitary confinement on mentally ill and medically vulnerable adult civil detainees.

All three began raising concerns under the Obama administration internally to CRCL leadership; they also brought their concerns to the DHS Office of Inspector General (OIG), to Congress, and finally to the press in increasingly desperate efforts to address the harms—life-threatening physical and psychological damage to migrant detainees—that they initially raised internally to DHS.

Despite the fact that these civil servants—DHS's own experts—have communicated their specific and verified concerns with increasing escalation, the detention practices they have warned as being harmful to migrant detainees have not only continued, but have increased in the surge of detention under the Trump administration's "zero-tolerance" immigration policy. As such, we remain gravely concerned that the oversight mechanisms within DHS are so limited in investigative scope, capacity, legitimacy, and authority that, rather than serve as checks on abuses and preventers of harm, their ineffectualness enables the very abuses and harms they are meant to check.

On June 27, 2019, we wrote a [letter](#) to this and other relevant Congressional committee chairs detailing our concerns regarding DHS's failures to address serious concerns raised by its own whistleblowers on matters of life and death, and we are grateful that this Committee is now conducting a hearing into this matter.

Below I have outlined both the nature of our whistleblower clients' disclosures and the processes they used to seek redress for their concerns that detention facilities pose the risk of harm to children and vulnerable adult migrant detainees. Over the past several months, their disclosures have continued to be validated, yet remain unaddressed. Taken together, they paint a picture of DHS oversight weaknesses that demand Congressional intervention to remedy.

A. Immigration Expert and Attorney Ellen Gallagher's Disclosures of ICE's Widespread Use of Solitary Confinement on Mentally Ill and Medically Vulnerable Adult Detainees

Attorney Ellen Gallagher, when working as a Senior Policy Advisor within the immigration section of DHS's Office of Civil Rights and Civil Liberties, discovered in reading hundreds of ICE segregation reports that ICE was regularly putting mentally ill and medically vulnerable adult migrant civil detainees in solitary confinement across dozens of ICE facilities in violation of statutory mandates and federal detention standards, practices that qualify as [torture under United Nations standards](#). Often segregation was used for reasons directly related to their mental illness.

These practices revealed that detainees—notably in civil detention which is by definition not punitive—were deprived of proper medical care and attention, even when suicidal; many were shackled, strip-searched, silenced, and brutalized; others missed immigration court dates that otherwise might have enabled them to seek bond, legal protection and counsel.

Examples she discovered and disclosed were, often on the face of the segregation reports and in their notes, egregious and troubling. One detainee was diagnosed with schizoaffective disorder with hallucinations and suicidal ideation, yet spent months in and out of solitary confinement before being sentenced to 390 more days for throwing his feces at a security guard. Another was sentenced to 45 days in “twenty-four-hour lockdown” because guards during a search of his cell found a single anti-anxiety pill, hidden in a book he was reading. Detainees on “suicide watch” were routinely placed in isolation without information as to the length of time they would remain there, whether or how frequently they would be monitored, or the medical treatment they would receive. Reports from a regional jail showed mentally ill immigration detainees naked in deplorable conditions and denied reentry to the general population until they agreed to maintain “proper hygiene.” Other detainees were sentenced to periods from 15 to 45 days in disciplinary segregation for offenses including “insolence,” “spitting,” “possession of a cellphone,” “failure to follow an order,” “attempted horseplay” and “attempted fighting.”

Ms. Gallagher began raising concerns in 2014 about ICE’s practices internally to CRCL management, which repeatedly chose not to investigate the individual cases she raised that evidenced serious violations of detention standards. She then raised concerns to DHS’s Office of Inspector General (OIG), and also filed a whistleblower disclosure with the Office of Special Counsel (OSC). The OSC deferred to the OIG, which failed to investigate the full scope of Ms. Gallagher’s disclosures. Despite two separate requests for reconsideration to the OSC to independently review the disclosures and supporting evidence, the OSC instead deferred to the OIG’s own incomplete investigation. During this period as well, Ms. Gallagher’s disclosures to Congress did not generate meaningful action.

In May 2019, Ms. Gallagher finally decided to go on the record after years of raising her concerns through every avenue within the government had failed to result in any meaningful investigation to address the widespread use of solitary confinement in immigration detention.¹

On June 3, 2019, the Department of Homeland Security Office of Inspector General (DHS OIG) issued a report, [Concerns about ICE Detainee Treatment and Care at Four Detention Facilities](#), that failed to address the systemic abuses and violations across ICE facilities reported by Ms. Gallagher, instead focusing on wrongdoing at only the four adult detention facilities it visited. The OIG report found, among other violations, that three out of four sites visited used improper segregation practices which both violated ICE policy standards and infringed upon detainee rights. The findings included premature placement into solitary confinement, use of restraints at all times when detainees were outside their cells, strip searches upon entering isolation, and inadequate time outside cells. While this report’s conclusions substantively confirmed Ms. Gallagher’s disclosures, made over a period of

¹ See “[A Homeland Security Whistleblower Goes Public About ICE Abuse of Solitary Confinement](#),” The Intercept (May 21, 2019), and “[Thousands of Immigrants Suffer in Solitary Confinement in U.S. Detention Centers](#),” NBC News (May 21, 2019). These press accounts also document Ms. Gallagher’s efforts to disclose evidence of ICE’s inappropriate use of solitary confinement in adult detention.

almost five years and documenting hundreds of examples of ICE's inappropriate use of solitary confinement, the report's recommendations were limited only to reforms at the four facilities visited by the OIG.

Despite the limited scope of the OIG's investigation and findings, Ellen Gallagher's warnings regarding ICE's use of solitary confinement were recently validated and expanded upon by the Project on Government Oversight (POGO), which last month released a [report](#), *ISOLATED: ICE Confines Some Detainees with Mental Illness in Solitary for Months*, demonstrating that approximately 40% of detainees placed in solitary confinement between January 2016 and May 2018 have mental illness, with more than 4,000 of the 6,559 records reviewed showing detainees being confined for more than 15 days. Through analyzing the results of a Freedom of Information Act request, POGO was able to confirm and describe ICE's continued and increased inappropriate use of solitary confinement across dozens of its facilities.

DHS's failure to address ICE's widespread use of solitary confinement on mentally ill and medically vulnerable detainees reveals the utter ineffectiveness of its oversight mechanisms.

CRCL failed to even investigate Ms. Gallagher's disclosures, despite its statutory mandate to "oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department" and to "investigate complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General."²

Likewise, the OIG has failed to conduct investigations to address systemic, inappropriate use of solitary confinement occurring across the ICE adult detention system in the face of clear, overwhelming evidence.

Worse, the OIG's limited investigative scope—be it because of limited resources, expertise, capacity, or mandate—has preempted other mechanisms for accountability, including the OSC whistleblower disclosure process. This process requires the agency head to investigate and respond to a whistleblower's valid disclosures and issue a report regarding steps they will take to address the problem. The whistleblower then has the opportunity to comment on the report and provide further evidence, with the OSC finally deciding whether the agency's report is adequate or not, and submitting the entire package to the President, congressional leaderships, and appropriate congressional committees.

If the OIG, deliberately or inadvertently, preempts OSC's investigations by failing to fully address a whistleblower's disclosures, and the OSC defers to the OIG, the upshot is that Congress is deprived of one of its most valuable mechanisms to fulfill its own mandate of overseeing the executive branch.

² See 6 U.S.C. § 345(a), Establishment of Officer for Civil Rights and Civil Liberties.

B. Drs. Scott Allen’s and Pamela McPherson’s Disclosures of Imminent Harm to Children in DHS Family Residential Centers

Our clients Drs. Allen and McPherson serve respectively as the medical and mental health subject-matter experts in detention for the Department of Homeland Security’s Office of Civil Rights and Civil Liberties (CRCL). In the course of investigating four of the Family Residential Centers for CRCL between 2014-2017—Artesia in New Mexico, Karnes and Dilley in Texas, and Berks in Pennsylvania—Drs. Allen and McPherson consistently raised concerns in their reports to CRCL as well as in extensive oral briefings about both the harms posed to children in detention generally as well as specific and systemic problems related to practices and policies at the family detention centers that endangered children. Indeed, their findings resulted in shutting down Artesia as too rife with problems to protect children at that facility.

When the Trump administration began expanding family detention as part of its “zero-tolerance” immigration policy, the doctors became gravely concerned that the issues that compromised care, and which had not yet been resolved, would be further exacerbated with the increased populations. This predictably put children at imminent risk of harm. In June 2018, Drs. Allen and McPherson exercised their rights as whistleblowers by communicating these concerns to CRCL management, to the DHS OIG, and to Congress.³

In addition to their overarching warnings that detention, for any amount of time, harms children, their specific concerns about systemic weaknesses at detention facilities included the lack of qualified medical and mental-health professionals; a lack of language translators making diagnoses exceedingly difficult; inadequate and dangerous facilities posed by the retrofitted prisons used to house families with small children; failure to provide trauma informed care; lack of training of custodial staff to care for at-risk children; inadequate detention standards; and confusing lines of authority and weak coordination between different agencies, program partners and government departments that can cause dangerous communication breakdowns and accountability failures that put children at risk.

CRCL refused to investigate the doctors’ concerns, claiming that the Inspector General had jurisdiction over their complaint.

However, the OIG never acknowledged receipt of let alone conducted an investigation into Drs. Allen and McPherson’s disclosures, first submitted on June 25, 2018, despite the doctors’ explicit warnings that a hastily deployed expansion of family detention unnecessarily places children at **imminent threat of risk** of significant mental health and medical harm. Only after we wrote our [letter to Congress in June 2019](#) decrying DHS oversight failures, and the then-Acting OIG faced questions in a July 12, 2019 [House Committee on Oversight and Reform hearing](#) about the OIG’s failure to respond to the doctors’ OIG complaint, were we approached by the OIG to discuss our clients’ concerns.

³ See, e.g., July 17, 2018 [Letter to Senate Whistleblower Caucus Chairs](#) from Drs. Scott Allen and Pamela McPherson.

Notably, CRCL has not conducted onsite investigations of family detention centers since **September 2017**, despite being aware of the systemic problems that put children in detention at risk of physical and psychological harm and despite receiving numerous complaints from or on behalf of detainees which would justify investigation.⁴

Not only did the doctors receive no indication from DHS oversight mechanisms that their concerns were being addressed, their warnings about harms to children in detention, echoed by more than fourteen medical professional associations, including the American Medical Association, the American Academy of Pediatrics, the American College of Physicians, and the American Psychiatric Association,⁵ were willfully ignored, as DHS in September 2018 proposed rule-making to replace the *Flores* settlement agreement, having the intended effect of allowing for prolonged and indefinite detention of children. Drs. Allen and McPherson, in [written comments](#) to DHS and ICE, expressed their opposition to practices that would prolong detention of children, particularly while the systemic issues they had identified that pose imminent harm remained unaddressed.

With all oversight mechanisms failing to end detention of children, the doctors escalated their concerns to the press by going on the record with [60 Minutes](#), [NPR](#), and [The Washington Post](#), writing in December 2018 after the death of seven year old Jakelin Caal Maquin in CBP custody, “[We warned DHS that a migrant child could die in custody. Now one has.](#)”

Rather than minimize detention as its own ICE Advisory Panel recommended in 2016,⁶ DHS decided instead to prolong detention indefinitely in its recent [final rule replacing the Flores Settlement Agreement standards](#), reflecting not only a disregard of its own medical and mental health subject matter experts within its own oversight entities, but the willful endangerment of migrant children in order to deter migration at the southern border. When its own scientific experts, supported by the overwhelming consensus of the medical professional community, warn that detention causes harm to children and DHS seeks to expand and prolong detention, DHS “oversight” of ICE detention may as well be meaningless.

⁴See March 19, 2019 Letter to Congress from Drs. Allen and McPherson, <https://jayapal.house.gov/wp-content/uploads/2019/03/031919-whistleblowers-letter-to-Congress-w-cover-letter-fact-sheet-re-children-in-detention.pdf>.

⁵ See Letter to House Judiciary Committee, House Energy and Commerce Committee, House Homeland Security Committee, and House Appropriations Committee (July 24, 2018) (letter viewable at https://www.acponline.org/acp_policy/letters/letter_house_oversight_request_on_child_detention_centers_2018.pdf); Letter to Senate Judiciary Committee, Senate HELP Committee, Senate HSGAC Committee, and Senate Appropriations Committee (July 24, 2018) (letter viewable at <https://www.psychiatry.org/newsroom/news-releases/apa-joins-health-care-community-in-calling-on-congress-to-hold-hearings-on-treatment-of-children-separated-from-parents-at-border>); American College of Physicians, *Internists Call for Congressional Oversight of Family Detention* (July 20, 2018), <https://www.acponline.org/acp-newsroom/internists-call-for-congressional-oversight-of-family-detention>.

⁶Report of the ICE Advisory Committee on Family Residential Centers (October 7, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/acfc-report-final-102016.pdf>

C. New Concerns About DHS Oversight Failures of ICE Detention Facilities

DHS announced just days ago that it [intends to resume detaining migrant families at the Karnes County Residential Center](#), one of the detention facilities about which Drs. Allen and McPherson identified concerns about the ability to prevent harm to children. Given that CRCL has not conducted any on-site investigations of DHS family detention centers since September 2017, it belies credulity to think Karnes will have remedied the myriad problems identified by Drs. Allen and McPherson that existed even before a surge in family detention.

As for addressing ICE's widespread use of solitary confinement on mentally ill and medically vulnerable detainees, despite multiple [letters from Congress](#) to ICE demanding investigations into their use of solitary confinement, it is unclear what DHS oversight mechanisms are doing to address these practices that are finally being publicly exposed and decried.

The DHS OIG, in talking with me and my colleague Irvin McCullough on August 5, 2019 in response to our letter condemning their failure to investigate the most serious of whistleblowers' concerns—practices that pose harm to civil detainees and innocent children—tried to explain some of what hampers their ability to conduct effective oversight. Diana Shaw, Assistant Inspector General for Special Reviews & Evaluations, noted problems that included limited resources, a lack of their own subject matter experts, the difficulty of conducting systemic investigations, limitations on their ability to conduct unannounced facility visits, a perceived limitation that they may only make recommendations relating to the facilities they actually observe, and unfunded mandates that result from the source of Congressional appropriations differing from multiple Congressional requests to conduct investigations.

These barriers to oversight should be fully investigated and remedied by Congress. When whistleblowers' concerns of the highest magnitude are ignored, as was in the case of Drs. Allen and McPherson, or only very partially addressed, as was the case with Ms. Gallagher's disclosures, one of the most valuable mechanisms for DHS accountability and oversight—the ability to meaningfully respond to, investigate and address whistleblowers' significant concerns—is broken.

There is a dire need for legitimate oversight that captures the full extent of ICE's and DHS's violations; accountability regarding the scope and recommendations of OIG's investigations; and explanations for CRCL's and the OIG's (and in Ms. Gallagher's case, the OSC's) failure to conduct oversight in response to these whistleblowers' disclosures. Whistleblowers' concerns should not only be acknowledged—they should be fully investigated, by both the administration and the Congress, to identify and correct abuses affecting millions of detainees and their families across the country.

Whistleblowers are the early warning systems to prevent problems and address abuses. These whistleblowers gave DHS the opportunity to prevent harm to children and adult migrants in the civil detention system; the fact that this Committee is now holding a hearing questioning the effectiveness of DHS oversight practices reveals that the executive branch oversight functions, including how they

respond to their own whistleblowers and their disclosures, are inadequate on their own without Congressional intervention or amplified scrutiny by the press and civil society.

I do want to acknowledge that leadership at both the DHS OIG, where Ms. Gallagher currently works as a senior advisor, and at CRCL, for which Drs. Allen and McPherson continue to serve as contracted subject matter experts, have not taken any retaliatory action to date against any of our clients. That DHS leadership in these oversight functions recognizes the rights of employees and contractors to raise concerns about such serious abuses reflects a respect and appreciation for whistleblowers as part of the overall oversight function at the agency. But lack of reprisal is not the same as responding in a meaningful way to the substance of serious disclosures. Congress should thoroughly investigate and remedy real and perceived barriers that have resulted in failed oversight by DHS of ongoing practices that continue to endanger migrant detainees at ICE detention facilities.

Thank you for the opportunity to contribute written testimony in support of this hearing. I, along with my clients, stand ready to support this Committee's efforts in any way we can.

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