WASHINGTON
LEGISLATIVE OFFICE

May 31, 2012

The Honorable John Boehner
Speaker
U.S. House of Representatives
H-232 The Capitol
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
235 Cannon House Office Building
Washington, DC 20515

RE: ACLU Views on the Department of Homeland Security Appropriations Act, 2013 (H.R. 5855)

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Dear Speaker Boehner and Minority Leader Pelosi,

On behalf of the American Civil Liberties Union (ACLU), a nonpartisan public interest organization dedicated to protecting the principles of liberty and equality set forth in the Constitution and in our nation's civil rights laws, and its more than half a million members, countless additional activists and supporters, and 53 affiliates nationwide, we write to express our views on the H.R. 5855, the Department of Homeland Security Appropriations Act, 2013 ("Act") While there are certain provisions we support in the bill, we strongly oppose others. This letter will detail those elements of the bill on which we take a position. The Rules Committee is reporting the bill under an open rule and we urge amendments modifying the bill in accordance with the comments set forth herein.

A. Funding for Border Patrol Agents

H.R. 5853 would boost border enforcement spending by almost $250 million, including funding for *not less than* 21,370 active Border Patrol agents. This funding, which follows a $500 million increase in FY 2012, is a flagrant waste of taxpayer money. Border apprehensions are at their lowest level in over forty years,[1] meaning that border enforcement resources should be reallocated and cut, rather than steadily increasing. Border Patrol agents themselves recognize the profligacy of spending. One agent, Christian Sanchez, testified last year before the Congressional Transparency Caucus that the Department of Homeland Security ("DHS") is betraying

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[1] *Net Immigration from Mexico Falls to Zero and Perhaps Less*, PEW HISPANIC, Apr. 23, 2012, *available at* http://www.pewhispanic.org/2012/ 04/23/ net-migration-from-mexico-falls-to-zero-and-perhaps-less

taxpayers: "The spending is to expand bureaucratic turf, not to protect our nation."[2] Each migrant apprehension at the border now costs five times more than before, rising from $1,400 in 2005 to over $7,500 in 2011.[3] In this era of fiscal discipline, wasteful border spending must be curtailed.

B. 287(g) Agreements

H.R. 5853 also establishes a *floor* of $68 million for 287(g) agreements, which deputize state and local police to act as immigration agents. This is $17 million, or *twenty-five percent*, more than DHS requested. Congress should not place a mandatory minimum spending requirement on this outdated, redundant, and deeply harmful immigration enforcement program. Assistant Secretary John Morton, Director of Immigration and Customs Enforcement, made clear that the agency intends to scale back 287(g).[4] This decision is sound, as the 287(g) program is riddled with flaws and has been subject to multiple critical Government Accountability Office ("GAO") and DHS Office of Inspector General ("OIG") audits.

The GAO concluded that DHS failed to document 287(g) program objectives, supervise state and local law enforcement agencies, or track, collect, and report data.[5] The OIG in 2010 issued a lengthy and scathing report setting forth 33 recommendations for DHS to address in order to ensure the program's integrity, economy, and efficiency.[6] The OIG report emphasized that DHS has not shown that "287(g) resources have been focused on aliens who pose the greatest risk to the public."[7] Unusually, the OIG followed up with two additional reports, adding recommendations because "there is no assurance that funds allocated to the 287(g) program were used as intended."[8]

287(g) has been largely supplanted by Secure Communities, which uses electronic fingerprint checks of those arrested and booked by state and local police to check immigration status. DHS's requested

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[2] Testimony of Christian Sanchez, Congressional Transparency Caucus, Jul. 29, 2011, *available at* http://www.skagitirc.org/IRC%20Materials/Sanchez%20Testimony%20-%20BorderPatrol.pdf

[3] IMMIGRATION POL'Y CTR., SECOND ANNUAL DHS PROGRESS REPORT (APR. 2011), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/2011_DHS_Report_041211.pdf.

[4] *Written testimony of U.S. Immigration and Customs Enforcement (ICE) Director John Morton for a House Committee on Appropriations, Subcommittee on Homeland Security hearing on The President's Fiscal Year 2013 Budget Request for ICE*, DHS.GOV, Mar. 8, 2012, http://www.dhs.gov/ynews/testimony/20120308-ice-fy13-budget-request-hac.shtm.

[5] GOVERNMENT ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER STATE PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009).

[6] DEPARTMENT OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, THE PERFORMANCE OF 287(G) AGREEMENTS (MARCH 2010), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf.

[7] *Id.* at 9.

[8] DEPARTMENT OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL, THE PERFORMANCE OF 287(G) AGREEMENTS REPORT UPDATE (SEPT. 2010), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-124_Sep10.pdf, at 8.

287(g) funding reduction is a product of its widespread implementation of Secure Communities.[9] DHS's budget justification is unequivocal: "Given the nationwide deployment of the Secure Communities interoperability system by the end of FY2013, it will no longer be necessary to maintain the more costly and less effective 287(g) program."[10] Government reports demonstrate that 287(g) is unfixable, with systemic problems DHS is unable to tackle. The House should not ignore this mountain of criticism by forcing DHS to spend $68 million on an unnecessary and deeply flawed program.

C. Funding for Immigration Detention Beds

Immigration detention is extremely costly to U.S. taxpayers, draining $2 billion this fiscal year. Much of this spending is wasteful, as detainees could be supervised effectively at far lower cost using alternatives to detention that have shown proven success. Yet H.R. 5853 would fund immigration detention beds at a *mandatory level* of 34,000. That is the highest capacity DHS has ever had, and is 1,200 beds above DHS's stated need. On February 15, 2012, Secretary Napolitano testified before the House Appropriations Subcommittee on Homeland Security that DHS did not need extra bed capacity: "[W]e have enough beds to handle the detained population." Given that each bed costs $60,000 annually to maintain,[11] it is folly for the House to exceed the detention bed figure requested by DHS. The following chart summarizes how H.R. 5853 would require DHS to spend an extra, unwanted **$73 million** on detention beds:

	Number of Beds
ICE Requested	32,800
H.R. 5853	34,000
Difference	1,200

DHS asked for a $53.4 million decrease in detention bed funding for a total of 32,800 detention beds. At a minimum, we urge the House to appropriate no more funds than requested by DHS for immigration detention.

D. Bar on Prosecuting Guantanamo Detainees in Federal Criminal Court

We oppose Section 533, which continues forward, for another fiscal year, a provision enacted last year's Department of Homeland Security Appropriations Act. The section would prohibit the Department of Justice from using funds to prosecute the alleged planners or conspirators in the

[9] DEPARTMENT OF HOMELAND SECURITY, FY 2013 BUDGET IN BRIEF (2012), *available* at http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf, at16 ("In light of the nationwide activation of the Secure Communities program, the Budget reduces the 287(g) program by $17 million. The Secure Communities screening process is more consistent, efficient and cost effective in identifying and removing criminal and other priority aliens.")

[10] Available at http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf, 1108.

[11] National Immigration Forum, The Math of Immigration Detention. (Aug. 2011), available at http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf

September 11, 2001, attacks in regular Article III federal courts. These are the same federal courts where the Department of Justice regularly tries and convicts defendants charged with international terrorism crimes. This law needlessly ties the President's hands in resolving the problem of Guantanamo and disposing of cases in a way that comports with human rights principles and the rule of law. The law restricts the government's ability to employ one of the most valuable counterterrorism tools available—criminal prosecutions in regular federal courts.

E. Ban on Abortion Funding

We oppose Section 566, which for the first time would enact within the Department of Homeland Security Appropriations Act a ban on abortion funding for women locked up by Immigration and Customs Enforcement ("ICE"), except in exceedingly narrow circumstances (rape, incest, and danger of death). Short of banning abortion outright, harsh restrictions on abortion coverage are attempts to make meaningful abortion access as difficult as possible.

For many women, ICE lock-up is the place where they are assaulted, abused, and denied medical treatment. Although women in ICE custody live in deplorable conditions, and their health may well be more compromised because of the fact that they are locked up, the DHS abortion ban has no exception for an abortion necessary to protect a woman's health. Many things can go wrong during a pregnancy. A woman's health could be at risk in ways that we cannot predict. A pregnant woman could develop cancer, diabetes, or heart conditions – in each of these cases, abortion care may be what she needs to protect her health, but the DHS abortion ban does not account for these situations.

Section 566 would mean that women locked up in immigration detention – women who rely on the government for their health care – could not have meaningful access to a health care service readily available to women of means and women with private insurance. The government should not discriminate in this way. It should not use its dollars to influence a poor woman's decision whether to carry to term or to terminate her pregnancy. Justice Brennan's powerful words about the Hyde Amendment apply equally here – indeed, all the more so to a population as uniquely vulnerable to the power of the federal government as women in ICE custody:

> "The Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality."[12]

[12] *Harris v. McRae*, 448 U.S. 297, 331 (1980) (Brennan, J. dissenting).

F. Funding for Computer Networks

We oppose Section 553 in its current form as potentially overbroad. Section 553 would prohibit the use of any funds appropriated by the Act for any computer network unless it "blocks the viewing, downloading, and exchanging of pornography" (with a carve-out for law enforcement and judicial purposes). Although the government may implement narrowly tailored restrictions to preserve network security and prevent unlawful activity on its own systems, internet blocking technology frequently covers content that is entirely protected by the First Amendment and that is necessary for government officials to perform their duties in a non-law enforcement or judicial context. For instance, internet blocking software often uses keywords or other indicators to blacklist certain sites. Officials and employees at the affected agencies may be denied access for non-law enforcement or judicial functions to sites discussing topics like sexual health or LGBT issues, which frequently are blocked as false positives by such software. As both a matter of First Amendment law and good governance, this is unwise. At the very least, Congress should adopt an additional exception permitting government officials to remove the blocking software as reasonably necessary for their work, and, to the extent Section 553 would apply to systems where adults are permitted unfettered access to all lawful content (in, for instance, libraries), the exception should permit such unfettered access without undue inquiry into the reasons behind removal of the block.

G. Funding for the Association of Community Organizers Now

We oppose Section 544, which would forbid the distribution of any funds made available by the Act to the now-defunct Association of Community Organizers Now ("ACORN"). Section 544 is facially unconstitutional as a violation of Article I, Section 9, Clause 3 of the U.S. Constitution (forbidding bills of attainder), and the First, Fifth and Fourteenth Amendments. It has long been settled that the Bill of Attainder Clause applies to all laws enacting punishment on specific individuals or groups of individuals without a judicial trial, including, especially, appropriations bills.[13] Furthermore, the ban on funding is clearly motivated by Congressional disapproval of ACORN's former mission and political inclination (ACORN has repeatedly been cleared by inquiries into any mishandling of federal funds). At the core of the First Amendment is the principle that Congress may not punish an individual or group of individuals because of disagreement with its message or mission. Additionally, the use of an appropriations bill to defund an entire group is a violation of the due process clause of the Fifth Amendment, and denies such a group the equal protection of the laws under the Fourteenth Amendment. That ACORN was forced to close its doors in part due to the removal of federal funding makes such a provision all the more offensive. Finally, we would point out the obvious: Congress has effectively shut down ACORN through its appropriations ban, rendering Section 544 unnecessary.

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[13] See *United States v. Lovett*, 328 U.S. 303, 316 (1946) ("The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal.").

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We urge you to support amendments that would make changes in accordance with these comments. Please contact Michael Macleod-Ball at mmacleod@dcaclu.org or at 202-675-2309 if you have questions or comments about the comments offered in this letter. Thank you for considering our views on this important piece of legislation.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Michael W. Macleod-Ball
Legislative Chief of Staff

Cc: United States House of Representatives