



May 21, 2013

The Honorable Harold Rogers
Chairman
House Committee on Appropriations
U.S. House of Representatives
2406 Rayburn HOB
Washington, DC 20515

The Honorable Nita M. Lowey
Ranking Member
House Committee on Appropriations
U.S. House of Representatives
2365 Rayburn HOB
Washington, DC 20515

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

RE: ACLU Views on the Department of Homeland Security Appropriations Act, 2014 (Draft Bill)

Dear Chairman Rogers and Ranking Member Lowey,

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 draft Department of Homeland Security Appropriations Act, 2014 ("Act"). While there are certain provisions we support in the bill, we strongly oppose others. The bill has literally hundreds of provisions and many of them impact civil liberties in one way or another. This letter does not attempt to address all of those issues, but details those key elements of the bill on which we take a position.

A. Funding for Border Patrol Agents

The Act would increase border enforcement spending by \$255 million above 2013 enacted funding levels, including funding for *not less than* 21,370 active Border Patrol agents. This funding is a flagrant waste of taxpayer money. Chairman Rogers has warned about the irrationality of border spending: "It is a sort of a mini industrial complex syndrome that has set in there. And we're going to have to guard against it every step of the way."¹ Border apprehensions are close to their lowest level in over forty years,² meaning that border enforcement resources should be reallocated and cut,

¹ Ted Robbins, "U.S. Grows an Industrial Complex Along the Border." NPR (Sept. 12, 2012), available at <http://www.npr.org/2012/09/12/160758471/u-s-grows-an-industrial-complex-along-the-border>

² *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>

rather than steadily increased. Border Patrol agents themselves recognize the profligacy of spending. One agent, Christian Sanchez, testified before the Congressional Transparency Caucus that the Department of Homeland Security (“DHS”) is betraying taxpayers: “The spending is to expand bureaucratic turf, not to protect our nation.”³ Each migrant apprehension at the border now costs five times more than before, rising from \$1,400 in 2005 to over \$7,500 in 2011.⁴ In this era of fiscal discipline, wasteful border spending must be curtailed.

B. 287(g) Agreements

The bill also establishes a *floor* of \$5.4 million for 287(g) agreements, which deputize state and local police to act as immigration agents. While this is a dramatic decrease from the \$68 million dollar floor proposed last year, 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).⁵ This decision is sound, as the 287(g) program is riddled with flaws and has been subject to multiple critical Government Accountability Office (“GAO”) ⁶ and DHS Office of Inspector General (“OIG”) audits.

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.⁷ 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.”⁸ Unusually, the OIG followed up with two additional reports, adding recommendations in part because “there is no assurance that funds allocated to the 287(g) program were used as intended.”⁹ The discriminatory policing harms of 287(g) are clear. For example, in September 2012, DOJ concluded that the Alamance County, NC, Sheriff’s Office – at the time one of ICE’s 287(g) partners – lied to Latino detainees about non-existent federal requests for immigration

³ Testimony of Christian Sanchez, Congressional Transparency Caucus, Jul. 29, 2011, *available at* <http://www.skagitirc.org/IRC%20Materials/Sanchez%20Testimony%20-%20BorderPatrol.pdf>

⁴ 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.

⁵ *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>.

⁶ GOVERNMENT ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER STATE PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009).

⁷ DEPARTMENT OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, THE PERFORMANCE OF 287(G) AGREEMENTS (MARCH 2010), *available at* http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_10-63_Mar10.pdf.

⁸ *Id.* at 9.

⁹ 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/mgmttrpts/OIG_10-124_Sep10.pdf, at 8.

detention, adding that “ACSO discriminates against Latinos in its jail booking and detention procedures.”¹⁰

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 287(g) funding reduction is a product of its widespread implementation of Secure Communities.¹¹ DHS’s FY 2013 budget justification was 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.”¹²

DHS’s plan to phase out task forces alone, while leaving jail models intact, is plainly inadequate. Because “[t]he 287(g) jail model does not impose federal oversight on the officers who make the initial arrests,” jail enforcement “opens the door to racial profiling and pretextual arrests.”¹³ As Alamance County’s practices make clear, jail agreements are plagued by the same problems as task forces; indeed, an in-depth study concluded that jail models failed to target serious offenders just as frequently as task forces (50% of the time).¹⁴ The 287(g) program’s principal defect is inherent and common to both models: state and local police have no business acting as immigration agents, in task forces or jails. 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 at least \$5.4 million on an unnecessary and deeply flawed program. Instead, 287(g) funding should be eliminated.

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. As Rep. Spencer Bachus (R-Ala.) stated earlier this year to ICE Director John Morton, “It looks to me like maybe there is an overuse of detention by this administration.”¹⁵ Yet the bill would fund immigration detention beds at a *mandatory level* of 34,000. That is the highest capacity DHS has ever had, and is 2,200 beds above DHS’s stated

¹⁰ U.S. DOJ, Civil Rights Division, Letter of Findings re: United States’ Investigation of Alamance County Sheriff’s Office (Sept. 18, 2012), available at <http://www.justice.gov/iso/opa/resources/171201291812462488198.pdf>

¹¹ 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>, at 16 (“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.”)

¹² Available at <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf>, 1108.

¹³ Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*. (Migration Policy Institute, 2011), 36, available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>.

¹⁴ *Id.* at 22.

¹⁵ Jude Joffe-Block, “ICE Head Answers More Questions On Detainee Release.” KPBS (Mar. 19, 2013), available at <http://www.kpbs.org/news/2013/mar/19/ice-head-answers-more-questions-detainee-release/>

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,¹⁶ it is folly for the House to exceed the detention bed figure requested by DHS. The following chart summarizes how the proposed bill would require DHS to spend an extra, unwanted **\$132 million** on detention beds:

	Number of Beds
ICE Requested	31,800
Draft Bill	34,000
Difference	2,200

DHS asked for a \$119.5 million decrease in detention bed funding for a total of 31,800 detention beds. At a minimum, we urge the House to appropriate no more funds than requested by DHS for immigration detention.

D. Funding for Alternatives to Detention

The bill fails to include language requiring funding to be used for alternatives to detention. This hugely expensive immigration prison system costs taxpayers \$166 per detainee per day, or about \$60,000 per detainee per year. Effective alternatives to detention (ATD), by contrast, cost from 30 cents to \$14 per day while providing adequate supervision. At a time of unprecedented pressure to cut government spending, the Committee should be reducing detention costs, and as a matter of policy, should not be detaining people who have pose no significant danger to the community and whose appearance at removal proceedings – and at removal, if ultimately ordered – could be ensured through less costly and draconian measures. While the Committee report commendably recommends allocating funding to ATD, the proposed language fails to include explicit language requiring expenditure of detention and removal operations funding on ATD for all persons who require supervision, but not in jail conditions.

E. Funding for Community Outreach and Resolution of Community Complaints

We oppose Section 544 of the bill, which mandates that no funds may be used to provide funding for the position of Public Advocate, or a successor position, within ICE. The bill’s prohibition on allocating funds to a Public Advocate or successor office, without creating or funding alternative mechanisms to respond to community concerns, fails to address ICE’s continued inability to appropriately respond to complaints regarding ICE enforcement and detention.

F. 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. The section would prohibit DHS from using funds to prosecute the alleged planners or conspirators in the September 11, 2001, attacks in regular Article III federal courts. These are the same federal courts

¹⁶ National Immigration Forum, The Math of Immigration Detention. (Aug. 2011), available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>

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.

G. Funding for the Association of Community Organizers Now

We oppose Section 545, which would forbid the distribution of any funds made available by the Act to the now-defunct Association of Community Organizers Now ("ACORN"). Section 545 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.¹⁷ 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 545 unnecessary.

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

Sincerely,



Laura W. Murphy
Director



Michael W. Macleod-Ball
Chief of Staff

cc: Members of the House Committee on Appropriations