



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

“What Does a Secure Border Look Like?”

**Submitted to the Subcommittee on Border and Maritime Security
of the U.S. House Committee on Homeland Security**

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I. Introduction

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than a half-million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to preserving and defending the fundamental rights of individuals under the Constitution and laws of the United States. The ACLU's Washington Legislative Office (WLO) conducts legislative and administrative advocacy to advance the organization's goal to protect immigrants' rights, including supporting a roadmap to citizenship for aspiring Americans. The Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants. The ACLU of New Mexico's Regional Center for Border Rights (RCBR) addresses civil and human rights violations arising from border-related immigration policies. RCBR works in conjunction with ACLU affiliates in California, Arizona, and Texas, as well as immigrants' rights advocates throughout the border region.

The ACLU submits this statement to the Subcommittee on Border and Maritime Security of the U.S. House of Representatives' Committee on Homeland Security on the occasion of its hearing addressing "What Does a Secure Border Look Like?" Our statement aims to provide the Subcommittee with an appraisal of the civil liberties implications of border security. The ACLU is particularly concerned with attempts to define border security that fail to take into account the fact that border security benchmarks in previous immigration reform proposals have been satisfactorily met. Any proposal for immigration reform should not be made contingent upon border security escalation, because:

- Deployment of additional border security along the U.S.-Mexico border would be wasteful and unnecessary, with apprehensions by Customs and Border Protection (CBP) personnel at their lowest level in 40 years and net migration from Mexico at zero; and
- Spending on the Southwest border has increased dramatically over the last decade with virtually no accountability measures, resulting in civilian deaths at the hands of CBP personnel and many other civil liberties abuses, including rampant racial profiling.

At a time of sequestration, when the federal government is poised to cut spending by 8.2 percent, our country can no longer afford to throw money down the border drain. Congress must not adopt the conventional wisdom of inadequate border security, nor heed siren calls for more border enforcement resources. Instead, border security resources should be guided by principles of fiscal responsibility, accountability and oversight, and attention to the true needs of border communities suffering from a wasteful, militarized enforcement regime. Experts, including from

the Department of Homeland Security, agree that the border is more secure than ever.¹ Congress should proceed unimpeded by border security obstacles to the vital task of providing a roadmap to citizenship for aspiring Americans in a way that advances our Constitution’s principles and American values of family unity and due process.

II. The Pathway to Citizenship Must Not Be Contingent on the False Metric of a “Completely Secure Border.” Instead, Immigration Reform Should End the Abusive Militarization of Border Communities.

a. The “Mini-Industrial Complex” of Border Spending

Congress should not seek to define a “secure border” as an airtight 2,000-mile border, because this would ignore the fact that border security benchmarks of prior proposed or enacted legislation (in 2006, 2007, and 2010) have already been met or exceeded.² In the last decade, the United States has relied heavily on enforcement-only approaches to address migration, using deterrence-based border security strategies:

- The U.S. government has expanded the powers of federal authorities by creating “Constitution-Light” or “Constitution-Free” zones within 100 miles of land and sea borders, areas in which CBP personnel claim they have authority that would be unconstitutional in other parts of the country, despite the fact that two-thirds of the American population resides within 100 miles of these borders.
- Because of “zero-tolerance” initiatives like Operation Streamline,³ the Department of Homeland Security (DHS) now refers more cases for federal prosecution than the Department of Justice’s (DOJ) law enforcement agencies. Federal prisons are already 39 percent over capacity, due in large part to indiscriminate prosecution of individuals for crossing the border without authorization, often to rejoin their families. The majority of those sentenced to federal prison last year were Hispanics and Latinos, who constitute only 16 percent of the population, but are now held in large numbers in private prisons.⁴

¹ Testimony of DHS Secretary Napolitano to the Senate Judiciary Committee (Feb. 13, 2013), available at <http://www.judiciary.senate.gov/pdf/2-13-13NapolitanoTestimony.pdf>

² Chen, Greg and Kim, Su. “Border Security: Moving Beyond Past Benchmarks,” American Immigration Lawyers Association, (Jan. 30, 2013). Available at: <http://www.aila.org/content/default.aspx?bc=25667|43061>

³ See generally ACLU, “Operation Streamline Issue Brief.” (Feb. 25, 2013), available at <http://www.aclu.org/immigrants-rights/operation-streamline-issue-brief>

⁴ U.S. Sentencing Commission, 2011 ANNUAL REPORT, Chapter 5, available at <http://www.ussc.gov/Data and Statistics/Annual Reports and Sourcebooks/2011/2011 Annual Report Chap5.pdf>

- Since 2003, the U.S. Border Patrol has doubled in size and now employs more than 21,400 agents, with about 85 percent of its force deployed at the U.S.-Mexico border.⁵ So many Border Patrol agents now patrol the southern border that if they lined up equally from Brownsville to San Diego, they would stand in plain sight of one another (about 10 per mile). This number does not include the thousands of other DHS officials, including CBP Office of Field Operations officers and one-fourth of all Immigration and Customs Enforcement (ICE) personnel deployed at the same border. It also does not include 651 miles of fencing, 333 video surveillance systems, and 9 drones for air surveillance.

From a fiscal perspective, from FY2004 to FY2012, the budget for CBP increased by 94 percent to \$11.65 billion, a leap of \$5.65 billion; this following a 20 percent post-9/11 increase of \$1 billion.⁶ By way of comparison, this jump in funding is more than quadruple the growth rate of NASA's budget and is almost ten times that of the National Institutes of Health. U.S. taxpayers now spend more on immigration enforcement agencies (\$18 billion) than on the FBI, DEA, ATF, U.S. Marshals, and Secret Service—*combined*.⁷

CBP's spending runs directly counter to data on recent and current migration trends and severely detracts from the true needs of border security. Over the last decade, apprehensions by the Border Patrol have declined more than 72 percent (2000-10). At a time when migrant apprehensions are lower than at any time since the 1970s, wasteful spending by CBP must be reined in.⁸ In FY2012, Border Patrol apprehended on average 18 people per agent.⁹ A weakening U.S. economy, strengthened enforcement, and a growing Mexican economy have led to a dramatic decrease in unauthorized migration from Mexico. In fact, net migration from Mexico is now zero or slightly negative (i.e., more people leaving than coming).¹⁰

The costs per apprehension vary per sector, but are at an all-time high. The Yuma, Arizona sector, for example, has seen a 95 percent decline in apprehensions since 2005 while the number of

⁵ Meissner, Doris, Kerwin, Donald M., Chishti, Muzaffar and Bergeron, Claire. Immigration Enforcement in the United States: The Rise of a Formidable Machinery, Migration Policy Institute, January 2013. Available at: <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>

⁶ Michele Mittelstadt et al., "Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11." (Migration Policy Institute, Aug. 2011), 3, available at http://www.migrationpolicy.org/pubs/FS23_Post-9-11policy.pdf

⁷ Migration Policy Institute, Immigration Enforcement, *supra*.

⁸ Testimony of DHS Secretary Napolitano to the House Judiciary Committee (July 19, 2012); DHS Fact Sheet, "Apprehensions by the U.S. Border Patrol: 2005–2010." (July 2011), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-apprehensions-fs-2005-2010.pdf>; see also Jeffrey Passel and D'Vera Cohn, "U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade." (Pew Hispanic Center, Sept. 1, 2010), available at <http://pewhispanic.org/reports/report.php?ReportID=126>

⁹ Chen and Kim, "Border Security," *supra*.

¹⁰ Philip E. Wolgin and Ann Garcia, "What Changes in Mexico Mean for U.S. Immigration Policy." (Center for American Progress, Aug. 8, 2011), available at http://www.americanprogress.org/issues/2011/08/mexico_immigration.html

agents has tripled.¹¹ Each agent was responsible for interdicting just 8 immigrants in 2010, contributing to ballooning per capita costs: each migrant apprehension at the border now costs five times more, rising from \$1,400 in 2005 to over \$7,500 in 2011.¹² Indeed, despite Border Patrol's doubling in size since 2004, overtime costs have amounted to \$1.6 billion over the last six years.¹³ Congress should heed House Appropriations Committee Chairman Hal Rogers' warning 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."¹⁴

b. Lack of CBP Oversight: Racial Profiling and Excessive Use of Force

Unprecedented investment in border enforcement without corresponding oversight mechanisms¹⁵ has led to an increase in human and civil rights violations, traumatic family separations in border communities, and racial profiling and harassment of Native Americans, Latinos, and other people of color – many of them U.S. citizens and some who have lived in the region for generations. The bipartisan framework that was proposed by the "Gang of Eight" Senators in late January rightly recognizes a need for strengthened prohibitions against racial profiling and inappropriate use of force. In addition, more must be done to transform border enforcement by prioritizing investment in robust and independent external oversight that includes input from border communities.

Stressed border communities are a vital component of the half-trillion dollars in trade between the U.S. and Mexico, and the devastating effects of militarization on them must be addressed in immigration reform. The U.S.-Canada border has experienced an increase in border enforcement resources as well, with northern border residents often complaining about Border Patrol agents conducting roving patrols near schools and churches and asking passengers for their documents on trains and buses that are traveling far from border crossings. The ACLU of Washington State has brought a class action lawsuit to end the Border Patrol's practice of stopping vehicles and interrogating occupants without legal justification. One of the plaintiffs in the case is an African American corrections officer and part-time police officer who was pulled over for no expressed reason and interrogated about his immigration status while wearing his corrections

¹¹ Richard Marosi, "Plunge in border crossings leaves agents fighting boredom." *Los Angeles Times* (Apr. 21, 2011).

¹² Immigration Policy Center, *Second Annual DHS Progress Report*. (Apr. 2011), 26, available at http://www.immigrationpolicy.org/sites/default/files/docs/2011_DHS_Report_041211.pdf

¹³ "Border Patrol overtime, staffing up; arrests down." Associated Press (Feb. 5, 2012).

¹⁴ 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>

¹⁵ Tim Steller, "Border Patrol faces little accountability," *Arizona Daily Star* (Dec. 9, 2012), available at: http://azstarnet.com/news/local/border/border-patrol-faces-little-accountability/article_7899cf6d-3f17-53bd-80a8-ad214b384221.html

uniform.¹⁶ A local business owner said he's "never seen anything like this. Why don't they do it to the white people, to see if they're from Canada or something?"¹⁷

CBP also aids and abets state and local police racial profiling practices, ensnaring U.S. citizens. In February 2011, Tiburcio Briceno, a naturalized U.S. citizen, was stopped by a Michigan State Police officer for a traffic violation while driving in a registered company van. Rather than issue him a ticket, the officer interrogated Briceno about his immigration status, apparently based on Briceno's Mexican national origin and limited English. Dissatisfied with Briceno's valid Michigan chauffeur's license, the officer summoned CBP, impounded Briceno's car, and told him he would be deported. Briceno says he reiterated again and again that he was a U.S. citizen, and offered to show his social security card but the officer refused to look.

Briceno was released after CBP officers arrived and confirmed that he was telling the truth. "Becoming a U.S. citizen was a proud moment for me," Briceno has since reflected. "When I took the oath to this country, I felt that I was part of something bigger than myself; I felt that I was a part of a community and that I was finally equal to every other American. Although I still believe in the promise of equality, I know that I have to speak out to make sure it's a reality for me, my family and my community. No American should be made to feel like a criminal simply because of the color of their skin or language abilities."¹⁸

In addition to racial profiling at and beyond the border, incidents of excessive use of force are on the rise, with at least 19 people killed by CBP officials since January 2010,¹⁹ including five U.S. citizens and six individuals who were standing in Mexico when fatally shot. On April 20,

¹⁶ Complaint available at http://www.aclu-wa.org/sites/default/files/attachments/2012-04-26--Complaint_0.pdf

¹⁷ William Yardley, "In Far Northwest, a New Border Focus on Latinos." *New York Times* (May 29, 2012) (emphasis added), available at <http://www.nytimes.com/2012/05/29/us/hard-by-canada-border-fears-of-crackdown-on-latinos-immigration.html?pagewanted=all>

¹⁸ ACLU of Michigan, "ACLU Urges State Police to Investigate Racial Profiling Incident." (Mar. 21, 2012) (emphasis added), available at <http://www.aclumich.org/issues/racial-justice/2012-03/1685>

¹⁹ Jorge A. Solis, 28, shot and killed, Douglas, AZ (Jan. 4, 2010); Victor Santillan de la Cruz, 36, shot and killed, Laredo, TX (March 31, 2010); Anastasio Hernandez Rojas, 32, tortured to death, San Diego, CA (May 28, 2010); Sergio Adrian H. Huereca, 15, shot and killed, El Paso, TX (June 7, 2010); Juan Mendez, 18, shot and killed, Eagle Pass, TX; Ramses Barron Torres, 17, shot and killed, Nogales, Mexico (Jan. 5, 2011); Roberto Pérez Pérez, beaten while in detention and died due to lack of proper medical care, San Diego, CA (Jan. 13, 2011); Alex Martinez, 30, shot and killed, Whatcom County, WA (Feb. 27, 2011); Carlos Lamadrid, 19, shot and killed, Douglas, AZ (March 21, 2011); Jose Alfredo Yañez Reyes, 40, shot and killed, Tijuana, Mexico (June 21, 2011); Gerardo Rico Lozana, 20, shot and killed near Corpus Christi, TX (Nov. 3, 2011); Byron Sosa Orellana, 28, shot and killed near Sells, AZ (Dec. 6, 2011); Alexander Martin, 24, died in car explosion that may have been caused by Border Patrol tasers (March 15, 2012); Charles Robinson, 75, shot and killed, Jackman, ME (June 23, 2012); Juan Pablo Perez Santillán, 30, shot and killed on the banks of the Rio Grande, near Matamoros, Mexico (July 7, 2012); Guillermo Arévalo Pedroza, 36, shot and killed, Nuevo Laredo, Mexico (Sept. 3, 2012); Valerie Tachiquin-Alvarado, 32, shot and killed, Chula Vista, CA (Sept. 28, 2012); José Antonio Elena Rodriguez, 16, shot and killed, Nogales, Sonora (Oct. 11, 2012); and Margarito Lopez Morelos, 19, shot and killed, Baboquivari Mountains, AZ (Dec. 2, 2012). This count does not include Border Patrol agent Nicholas J. Ivie, 30, who was fatally shot by friendly fire near Bisbee, AZ (Oct. 2, 2012).

2012, PBS's *Need to Know*²⁰ program explored the trend of CBP's excessive use of force, with a focus on Anastasio Hernandez Rojas. New footage depicting a dozen CBP personnel surrounding and repeatedly applying a Taser and other force to Mr. Hernandez – who was shown to be handcuffed and prostrate on the ground contrary to the agency's incident reporting – shocked viewers. The San Diego coroner classified Mr. Hernandez's death as a homicide, noting in addition to a heart attack: "several loose teeth; bruising to his chest, stomach, hips, knees, back, lips, head and eyelids; five broken ribs; and a damaged spine." CBP's version of events described a "combative" person: force was needed to "subdue the individual and maintain officer safety." Spotlighting another CBP fatality, three weeks ago the *Arizona Republic* reported that "An autopsy report raises new questions about the death of a Mexican youth shot by at least one U.S. Border Patrol officer four months ago in Nogales. The Border Patrol has maintained that Jose Antonio Elena Rodriguez, 16, was throwing rocks over the border fence at agents on the U.S. side when an agent fired across the international border the night of Oct. 10. But entry and exit wounds suggest that all but one of as many as 11 bullets that struck the boy entered from behind, according to the report by two medical examiners working for the Sonora Attorney General's Office."²¹

After a Congressional letter signed by 16 Members was sent to DHS Secretary Janet Napolitano, DHS Acting Inspector General Charles Edwards, and Attorney General Eric Holder,²² on July 12, 2012, the Associated Press reported that a federal grand jury was investigating the death of Anastasio Hernandez.²³ Border Patrol's use-of-force incidents have attracted international scrutiny with the government of Mexico,²⁴ the Inter-American Commission on Human Rights,²⁵ and the Office of the United Nations High Commissioner for Human Rights²⁶ weighing in.

While the federal government has the authority to control our nation's borders and to regulate immigration, CBP officials must do so in compliance with national and international legal norms and standards. As employees of the nation's largest law enforcement agency, CBP personnel should be trained and held to the highest professional law enforcement standards. Systemic, robust, and permanent oversight and accountability mechanisms for CBP should be

²⁰ PBS *Need to Know* special, aired April 20, 2012 and entitled "Crossing the line at the border," available at <http://www.pbs.org/wnet/need-to-know/security/video-first-look-crossing-the-line/13597/>

²¹ Bob Ortega, "New theory on Border Patrol killing of boy." *Arizona Republic* (Feb. 7, 2013), available at <http://www.azcentral.com/news/articles/20130206border-patrol-killing-boy-new-theory.html>

²² Congressional sign-on letter sent May 10, 2012 to Secretary Janet Napolitano available at: <http://serrano.house.gov/sites/serrano.house.gov/files/DHSletter.pdf>; letter sent to DHS Inspector General Charles Edwards available at: <http://serrano.house.gov/sites/serrano.house.gov/files/DHSIGletter.pdf>; letter sent to DOJ Attorney General Eric Holder available at: <http://serrano.house.gov/sites/serrano.house.gov/files/DoJLetter.pdf>

²³ Grand Jury Probes Anastasio Hernandez Border Death, available <http://www.kpbs.org/news/2012/jul/12/grand-jury-probes-border-death/>

²⁴ See, e.g., Bret Stephens, "The Paradoxes of Felipe Calderón." *Wall Street Journal* (Sept. 28, 2012), available at http://online.wsj.com/article/SB10000872396390443916104578022440624610104.html?mod=hp_opinion

²⁵ See "IACHR condemns the recent death of Mexican national by U.S. Border Patrol Agents." (July 24, 2012), available at http://www.oas.org/en/iachr/media_center/PReleases/2012/093.asp

²⁶ See U.N. Radio, "United States urged to probe deaths of Mexican migrants at border." (May 29, 2012), available at <http://www.unmultimedia.org/radio/english/2012/05/united-states-urged-to-probe-deaths-of-mexican-migrants-at-border/>

integral to border security measures. Congress must seize this moment for immigration reform to transform border enforcement in a manner that is fiscally responsible, enlists border communities in defining their true needs and upholds Constitutional rights and American values.

III. Conclusion

The ACLU urges Congress to prioritize the reduction of abuses in the currently-oppressive immigration and border enforcement system which has cost \$219 billion in today's dollars since 1986.²⁷ By jettisoning proposals for escalated border security that clash with civil liberties and thereby creating space for genuine immigration reform, Congress can ensure that the roadmap to citizenship for aspiring Americans is a generous one, free of unjust obstacles. Members would thereby maximize the historic expansion of Constitutional freedoms for spouses, friends, parishioners, and neighbors in our communities, who contribute every day to their successes and deserve full and prompt citizenship.

²⁷ Robbins, "*U.S. Grows*," supra.