

Statement of

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Before the

**United States Senate  
Homeland Security and Governmental Affairs Committee**

**Hearing on Deferred Action on Immigration: Implications and Unanswered Questions  
February 4, 2015**

Thank you Chairman Johnson, Ranking Member Carper, and distinguished members of the Committee. I am grateful to have the opportunity to join you at this hearing and to try to contribute to the Committee's consideration of the critical questions at issue today.

My name is Bo Cooper. I am a partner at Fragomen, Del Rey, Bernsen, & Loewy LLP, an international immigration law firm. In recent years, I have taught immigration law at schools in Washington, D.C. and Michigan, including courses on immigration and national security, and on prosecutorial discretion and other key aspects of federal immigration enforcement policy. From 1999 up until the launch of the Department of Homeland Security in 2003, I served as General Counsel of the U.S. Immigration and Naturalization Service (INS). I served in this position during Administrations of both parties. At that time, the border enforcement, interior enforcement, and adjudications functions that are now distributed among the three separate DHS immigration agencies—U.S. Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS)—were all the combined responsibility of the agency whose legal function I oversaw.

Drawing on these three perspectives—public service, private practice, and academics—I will try today to help address some of the Committee's concerns about the implementation of the recent DHS directives on immigration, a set of administrative policies to enhance the effectiveness and rationality of the nation's immigration system. These measures are not a substitute for Congressional action, but they do represent an important first step in the process of reforming an outdated system that has suffered from legislative stalemate. While these directives touch on many areas of immigration policy, the issues that have garnered the most attention and concern are the expansion of the Deferred Action for Childhood Arrivals (DACA) program and the creation of the Deferred Action for Parents of Americans and Lawful Permanent Residents<sup>1</sup> (DAPA) program.

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<sup>1</sup> This program is also called Deferred Action for Parental Accountability. See U.S. Citizenship and Immigration Services, *Executive Actions on Immigration*, available at <http://www.uscis.gov/immigrationaction>.

This hearing raises questions that are key to a proper evaluation of the recent DHS directives. Policy makers must necessarily address the financial, logistical, enforcement, and security concerns surrounding any new or expanded program, especially one affecting a complex, crucial, and sensitive national policy priority like immigration. I hope to assuage some of the concerns that have been expressed in the congressional and other public debate over the DHS directives, including the expansion of DACA and the implementation of DAPA as part of an integrated series of initiatives announced by the Secretary of Homeland Security. I will focus my testimony on the following key points:

- The DACA and DAPA programs rest on solid legal and policy grounds. They represent a sensible and principled application of the prosecutorial discretion that DHS must exercise given the scope of the problems facing our nation's immigration system today, coupled with DHS's finite resources.
- DHS has the tools and capacity to handle implementation of these programs from a logistical, financial, and enforcement perspective. In meeting the challenges ahead, DHS is operating from the considerable advantage of having, with the 2012 implementation of DACA, a recent model and experience on which to base its current planning. DHS ran an effective initial rollout of DACA, and can use that experience and the several-month implementation period to prepare for the further expansion of DACA and the impending launch of DAPA. Moreover, DHS has designed these programs to present no cost to taxpayers and to be self-funded by the fees requestors must pay. These new and expanded programs are of course broader than DACA, but our immigration agencies are designed to have the flexibility to scale to evolving caseloads and demands.
- Based not only on this experience but also on decades of expertise, sharpened forcefully by the thinking, resources, and energy that have poured into the immigration function since the terror attacks of 2001 and the creation of DHS, the agency should be well-equipped to handle public safety or national security issues relating to the DACA and DAPA initiatives. DHS has long prioritized border enforcement, security, and the apprehension and removal of criminal aliens, just as Congress has specifically mandated. The DACA and DAPA programs are designed to help the agency further focus its resources in that regard.
- DHS's new policies should also strengthen public safety, as millions of undocumented individuals currently living and working outside the system will come forward. They will make their presence known, enter into federal law enforcement databases, and undergo background checks. DHS has strong measures in place to conduct national security and criminal background checks and detect fraud. DHS will be able to leverage its extensive and sophisticated screening experience in its implementation of the new DACA and DAPA programs.
- The enforcement prioritization reflected in the recent DHS directives represents an improvement to the administration of our country's outdated and insufficiently effective immigration system. These measures should not be viewed as usurping the congressional function. To the contrary, I believe that these actions serve up to Congress a set of

important improvements, made within the confines of existing law, to an immigration system that does not serve our national interest in the way that it must. But only Congress, through reforms enacted through the legislative process that has always been such a proud feature of the American political system, can change our laws so that immigration fuels American creativity, economic strength, and competitiveness to the maximum possible extent.

**I. Congress can reasonably debate whether DACA and DAPA are the right policy, but the programs rest on sound and well-established legal foundations.**

While the committee's focus at this hearing is properly on the logistical and security risks of DACA and DAPA, I believe it is useful to address briefly the strong legal underpinnings of those programs. In my opinion, DACA and DAPA were implemented with sound legal footing. The legal arguments supporting this position have been developed in depth in other fora, but it is helpful at the outset of this discussion to recall the programs' legal foundation.

Just as it is throughout law enforcement, prosecutorial discretion is a necessary and long-standing feature of our immigration system. The Supreme Court recently emphasized the breadth of prosecutorial discretion in the immigration context and summarized the myriad considerations that immigration authorities must balance in implementing immigration laws:

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.<sup>2</sup>

Congress has also explicitly acknowledged or even required prosecutorial discretion in the immigration context in substantive statutes and in appropriations bills. DHS funding levels contemplate the removal of fewer than 400,000 of the approximately 11 million illegal immigrants in the United States each year, making the exercise of prosecutorial discretion a necessary and inherent feature of our immigration system. The DACA and DAPA programs are appropriate exercises of this prosecutorial discretion, and both initiatives will focus removal resources on the high priority cases that the Secretary has identified in light of Congress's direction and the interests of national security, border integrity, and public safety. In short, the

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<sup>2</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

programs enable DHS to focus on deporting those illegal immigrants who pose the most significant threats to American security.

The DACA and DAPA programs are part of DHS's broader focus on its mission to secure our nation's borders. In recent years, DHS has spent every penny of its budgeted funds involved with apprehending and deporting aliens, and there is no reason to believe that DACA or DAPA will affect this practice. In 2012, for instance, the federal government spent \$17.9 billion on immigration enforcement. This sum is more than the budgets of the FBI, DEA, ATF, Secret Service, and U.S. Marshals Service *combined*. There were more than 577,295 removals and returns in 2014,<sup>3</sup> and the number of people trying to cross our borders illegally is the lowest since the 1970s.<sup>4</sup> DHS is also deporting an increasing number of convicted criminals. These statistics indicate active enforcement—not abdication of legal duty.

DHS's use of the "deferred action" tool under DACA and DAPA is neither new nor unprecedented. Deferred action and similar programs with different nomenclature<sup>5</sup> have been a crucial part of immigration enforcement for more than 50 years. Presidents have granted deferred action or similar categorical discretionary relief in the past. Not only has Congress never moved to quash deferred action, but it has in fact explicitly recognized it by statute.<sup>6</sup> Deferred action has been mentioned in administrative regulations<sup>7</sup> and Supreme Court decisions.<sup>8</sup> Thus, every branch of the federal government has at least acknowledged if not encouraged the use of deferred action.

Finally, DHS's authority to issue work permits to recipients of deferred action is long-standing and clearly established. Since at least the 1980s, the former INS understood that the authority to decide which aliens would receive permission to work fell within the general discretionary authority of the agency.<sup>9</sup> Congress has also authorized the Secretary of Homeland Security to

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<sup>3</sup> DHS Press Release, *DHS Releases End of Year Statistics* (Dec. 19, 2014), available at <http://www.dhs.gov/news/2014/12/19/dhs-releases-end-year-statistics>.

<sup>4</sup> White House Press Release, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

<sup>5</sup> Programs similar to DACA and DAPA include Deferred Enforced Departure, Extended Voluntary Departure, and Family Fairness.

<sup>6</sup> See, e.g., 8 U.S.C. § 1227(d)(2) ("The denial of a request for administrative stay of removal under this subsection shall not preclude the alien from applying for...deferred action."); 8 U.S.C. § 1154(a)(1)(D)(i)(II, IV) (citing individuals "eligible for deferred action").

<sup>7</sup> See, e.g., 8 C.F.R. § 109.1(b)(7) (1982) (allowing work permits for deferred action recipients).

<sup>8</sup> *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). Lower court decisions have also referenced deferred action. See, e.g., *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987).

<sup>9</sup> See Office of Legal Counsel, U.S. Dept. of Justice, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014) at 21 n. 11.

grant work permits,<sup>10</sup> and USCIS has granted such permits to deferred action recipients who demonstrate economic necessity to work.<sup>11</sup> Work authorization has also historically accompanied other temporary grants of relief from deportation.<sup>12</sup> Work authorization to DACA and DAPA recipients thus relies on the same authority that the Executive Branch has exercised for over 30 years. DACA and DAPA provide no special path to citizenship and no special Green Card for those recipients, only temporary permission to be present in this country, with work authorization if the recipients can show economic necessity. As DHS has repeatedly emphasized, a grant of deferred action can be revoked at any time.<sup>13</sup>

## **II. DHS's prioritization under DACA and DAPA is a common sense, effective policy choice.**

As discussed above, our current immigration scheme inevitably requires the prioritization of limited enforcement resources. With current levels of DHS funding, the individuals who will receive deferred action under DACA or DAPA are unlikely to be deported even absent those programs. DACA and DAPA are, in a practical sense, a policy recognition of that reality. DHS's goal has long been to target criminals and national security threats over illegal but otherwise law-abiding immigrants, and DACA and DAPA are a more transparent framework to support that aim.

While DACA and DAPA establish threshold eligibility criteria, the grant of deferred action is an individualized determination based on case-by-case exercise of discretion. Secretary Johnson's memoranda outlining the initiatives set forth broad policy goals but also specifically instruct officers to make case-by-case determinations based on several non-exhaustive factors.<sup>14</sup> And the early DACA statistics suggest that USCIS is exercising precisely the type of individualized

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<sup>10</sup> See 8 U.S.C. § 1324A(h)(3) (defining "unauthorized alien" to exclude aliens "authorized to be so employed by this Act or by the Attorney General" [now the Secretary of Homeland Security]).

<sup>11</sup> See 8 C.F.R. § 274a.12(c)(14).

<sup>12</sup> For example, in the aftermath of Hurricane Katrina, USCIS allowed F-1 visa holders who were displaced from their course of study by the devastation to apply for work authorization. See [http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student\\_11\\_25\\_05\\_PR.pdf](http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf).

<sup>13</sup> See Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) at 2.

<sup>14</sup> See Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014) at 5-6; Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) at 5.

decision making contemplated by the memoranda, with more than 38,000 denials through the end of 2014.<sup>15</sup>

DHS's prioritization is also consonant with the long-standing principle that America will gladly absorb talent and ambition from abroad while protecting its security interests. The DACA and DAPA programs will allow immigrants who have been present in our country for years, if not decades, to stop living in the shadows. Law enforcement officers have resoundingly supported this move, which will make immigrants who need help from police more likely to seek it and those who witness crimes more likely to provide information to the police. DACA and DAPA will help to break down walls of distrust between immigrant communities and the police officers who serve them, increasing security for all involved.<sup>16</sup>

The DACA and DAPA programs also represent a financially sound use of limited public resources. According to the Council of Economic Advisors, over the next 10 years these programs will conservatively raise the GDP by 0.4 percent, raise average wages for U.S.-born workers by 0.3 percent, cut federal deficits by \$25 billion, and have no impact on the likelihood of employment for U.S.-born workers.<sup>17</sup> To the contrary, the programs will eliminate the incentive that employers now have to hire unauthorized workers at low wages instead of hiring lawful workers. The Congressional Budget Office has confirmed the fiscal responsibility of DACA and DAPA, concluding recently that a bill to eliminate the programs would increase deficits by \$7.5 billion.<sup>18</sup> And as discussed below, DHS believes that the applicant fees are set at a level that will finance the expansion necessary to adjudicate them.

And while DACA and DAPA are good policy from a governmental efficacy standpoint, they will also have positive effects on those who given deferred action under the programs. DACA and DAPA recipients are not the people that most American citizens want to see deported, and there

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<sup>15</sup> See Decl of Donald W. Neufeld, Doc. 130-11, *Texas v. United States*, Case No. 1-14-CV-00254 (S.D. Tex. Jan. 30, 2015) at ¶ 23. USCIS rejected a further 43,174 requests because they had a fatal flaw such as failure to submit the required fee or failure to sign the request. See *id.* at ¶¶ 14, 23.

<sup>16</sup> See, e.g., Amici Curiae Brief of Major Cities Chiefs Association, Police Executive Research Forum, and Individual Sheriffs and Police Chiefs in Opposition to Plaintiffs' Motion for Preliminary Injunction, Doc. 83-1, *Texas v. United States*, Case No. 1-14-CV-00254 (S.D. Tex. Jan. 12, 2015).

<sup>17</sup> At the upper bound, CEA estimates that these programs will raise GDP by 0.9 percent and shrink deficits by \$60 billion over the next ten years. See White House Council of Economic Advisers, *The Economic Effects of Administrative Action on Immigration*, Nov. 2014, available at [http://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf).

<sup>18</sup> Congressional Budget Office, Letter Re: Budgetary Effects of Immigration-Related Provisions of the House-Passed Version of H.R. 240, An Act Making Appropriations for the Department of Homeland Security (Jan. 29, 2015), available at <https://www.cbo.gov/sites/default/files/cbofiles/attachments/hr240.pdf>.

are real fiscal, human, and societal tolls when an American child is separated from her undocumented mother through deportation proceedings. DACA and DAPA give a measure of safety to the citizen child to alleviate the fear that her undocumented mother will be sent to her country of origin despite the fact that she has lived in the United States for decades. No longer do undocumented but otherwise law-abiding immigrants have to fear that a call to report a crime against them will result in their own deportation. DACA and DAPA bear the mark of good policy not only because they improve our government but also because they enhance public safety, further our values as a Nation, and improve the lives of millions of human beings who, because of their long-standing residency and citizen or permanent resident children, are integrated into the fabric of American society.

### **III. DHS is prepared to implement DACA and DAPA.**

Throughout their history, the U.S. immigration agencies have had to adapt and react to policy shifts and evolving logistical demands. In addition to capacities built and lessons learned from that history, DHS here has a very specific, recent, and similar model on which to build in meeting the new challenges of DACA and DAPA implementation. I believe that the existing DACA program also can serve as a useful model from which the Committee can examine DHS's ability to succeed with new initiatives.

As of the end of 2014, USCIS had received more than 727,000 applications under DACA and had around 50,000 pending cases.<sup>19</sup> Estimates of the number of unauthorized immigrant youth vary, but one recent report puts the number at 1.2 million.<sup>20</sup> Thus, approximately 50-60 percent of eligible youth have applied for DACA relief under the existing program.

DAPA represents a challenge for DHS that is different in number but not in kind from the DACA program. While estimates vary concerning the number of potential DAPA recipients, a reasonable estimate is roughly 3.5 to 4 million.<sup>21</sup> I understand that DHS is prepared for a range of DAPA filing rates that may match that of DACA or be submitted at a different rate.<sup>22</sup> DHS

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<sup>19</sup> See Decl of Donald W. Neufeld, Doc. 130-11, *Texas v. United States*, Case No. 1-14-CV-00254 (S.D. Tex. Jan. 30, 2015) at ¶ 23. See also USCIS, *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2014 First Quarter*, available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf>.

<sup>20</sup> Jeanne Batalova, Sarah Hooker, and Randy Capps, *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action*, Migration Policy Institute, Aug. 2014, at 1.

<sup>21</sup> See, e.g., Migration Policy Institute, Press Release, *MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program* (Nov. 20, 2014), available at <http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>.

<sup>22</sup> See U.S. Citizenship and Immigration Services, *Executive Actions on Immigration*, available at <http://www.uscis.gov/immigrationaction>.

has met the challenges of the DACA program with alacrity, and I see no reason why this success should not continue with the implementation of DAPA.

DHS is already taking steps to meet the logistical challenges posed by DAPA. DHS has chosen a site in Northern Virginia that will serve as the centralized processing location for DAPA. The agency prudently chose a site that was already leased by the government, was the right size for the project, was already furnished, and could be easily upgraded to meet its IT demands. While a typical acquisition of a space this size would take years and no existing site could accommodate the expansion of necessary personnel, DHS was able to secure the space in a matter of months. I understand that DHS has projected that it will hire approximately 700 permanent employees to process the DAPA and DACA applications, with an additional 200-300 contractors for surge support.

Finally, as with immigration adjudications generally, the law establishes a sensible model for funding the DAPA expansion. USCIS, which will primarily administer the adjudications function of the programs, is fee-funded by statute.<sup>23</sup> I understand that the fees that DACA and DAPA applicants will pay cost several hundred dollars each and are set at a level that will finance this expansion.<sup>24</sup> User fee authority has been a feature of funding immigration benefits since the late 1980s. Each Administration has worked with congressional appropriators over the past decades to carry out this authority in an efficient and effective manner to handle surges in application flow and to time the receipt of applicant fees with expenditures associated with the benefits sought. Congress and this Administration have the tools and experience necessary to make these programs financially sound and self-sustaining. In other words, the DAPA and DACA programs will be self-funding such that they will not cost taxpayers, and indeed will ultimately benefit them through the positive economic effects of DAPA and DACA.

#### **IV. DHS's implementation of DACA and DAPA increases public safety and strengthens our national security.**

In my view, DHS's implementation of DACA and DAPA stand to strengthen—not hinder—our national security interests. DACA and DAPA should not raise any national security issues outside the norm for the agency. DHS is accustomed to screening applicants for security concerns, and this process is a basic requirement for most visa approvals. At the moment, the illegal immigrant population is not subject to any background checks, but in applying for DACA and DAPA they will have to provide names, addresses, fingerprints and other personal history to DHS, which will conduct a robust security check.

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<sup>23</sup> See 8 U.S.C. § 1356(m) (“[F]ees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services...[and] may also be set at a level that will recover any additional costs associated with the administration of the fees collected.”)

<sup>24</sup> See U.S. Citizenship and Immigration Services, *Executive Actions on Immigration*, available at <http://www.uscis.gov/immigrationaction>.



I understand that DACA and DAPA applicant fingerprints will be run through numerous law enforcement databases both within and outside DHS that contain information from local, state, and federal law enforcement agencies.<sup>25</sup> I also understand that applicant fingerprints will be run against TECS,<sup>26</sup> which provides information about ongoing investigations and warrants, as well as fraud alerts. A background check will also be run against the unified DHS watchlist.<sup>27</sup>

DHS also has robust anti-fraud measures in place that would be applied to the DACA and DAPA context. I understand that DHS is working with other countries to build a library of exemplar documents with which it can train its adjudicators to recognize fraudulent identity documents from abroad. I further believe that DHS plans to use the Immigrations and Customs Enforcement (ICE) forensics laboratory to verify the authenticity of suspect documents.

DHS has extensive experience in adjudicating each element of the DACA and DAPA applications. DHS has developed the capacity to confirm parent-child relationships through, for instance, the processing of hundreds of thousands of petitions for alien relative (I-130) forms each year. Similarly, DHS (and before it the INS) has made proof of residency determinations for decades. DHS has already applied this expertise to making such determinations in the hundreds of thousands of adjudicated DACA applications. I understand that DHS has processes in place to establish school enrollment and that the agency has received exemplar documents from school districts around the country. Finally, I understand that DHS has implemented the added measure of running birth certificates that it receives through the EVVE, a vital statistics database,<sup>28</sup> a process that DHS intends to continue in adjudicating DAPA applications.

I am also aware that DHS has robust internal processes to ensure that, if a criminal is identified through its adjudication of an application, the appropriate authorities are notified so that criminal prosecution and/or immigration removal proceedings can begin.<sup>29</sup> For this reason, I believe that the DACA and DAPA programs have positive criminal enforcement consequences. Indeed, DHS has already assisted law enforcement in locating criminals who applied for DACA benefits.<sup>30</sup>

**V. DACA and DAPA should not contribute to the number of illegal crossings over the southern border.**

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<sup>25</sup> These databases include IDENT, CJIS, the DOJ print index, and FBI holdings.

<sup>26</sup> See Privacy Impact Assessment for the TECS System: CBP Primary and Secondary Processing, available at <http://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-cbp-tecs-sar-update.pdf>.

<sup>27</sup> I further understand that these checks will be run using any aliases or misspellings of the alien's name.

<sup>28</sup> The EVVE database is operated by the National Association for Public Health Statistics and Information Systems and is used by numerous federal agencies to validate birth and death records. See NAPHSIS, *About EVVE*, available at <http://www.naphsis.org/about-evve>.

<sup>29</sup> See Decl of Donald W. Neufeld, Doc. 130-11, *Texas v. United States*, Case No. 1-14-CV-00254 (S.D. Tex. Jan. 30, 2015) at ¶ 22.

<sup>30</sup> *Id.*

I do not believe that the presence of the DACA and DAPA programs will contribute to the number of illegal crossings at the United States-Mexico border. Applicants for DACA and DAPA must meet strict eligibility requirements. Both programs are only available for aliens who have been residing in the United States since 2010,<sup>31</sup> and, as discussed above, DHS rigorously assesses the evidence presented to verify that the applicant meets the criteria. DHS has redoubled its efforts to secure our southern border by increasing resources deployed there and prioritizing the return of recent border crossers.<sup>32</sup> This has been made possible in part by significant increases in border enforcement funding from Congress, for which there has been bipartisan support in numerous recent Budgets.

Those who have crossed illegally into the United States within the last five years are not eligible for DACA or DAPA, and DHS and the U.S. Department of State have launched an aggressive international campaign designed to dispel any potential misinformation concerning these new programs.<sup>33</sup> Congress and the Administration have the same objective here: avoiding the creation of false expectations about DACA/DAPA eligibility among those who might consider crossing illegally. As long as border enforcement remains at current levels and DACA and DAPA claims are adjudicated with care, the existence of these programs should not increase illegal immigration. Congress can properly exercise its oversight role to ensure that these enforcement and adjudication goals are met, and such actions by Congress should be welcomed by the Administration.

While it is essential to analyze whether DACA drove the uptick in unaccompanied children arriving at the southern border in the summer of 2014, the data do not indicate that it did.<sup>34</sup> Most importantly, the nationalities of the persons arriving in that flow are not consistent with the possibility that the flow was DACA-driven. Three of the top four origin countries for the arriving minors were Honduras, Guatemala, and El Salvador.<sup>35</sup> Crime and violence levels in

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<sup>31</sup> USCIS, *Executive Actions on Immigration*, available at <http://www.uscis.gov/immigrationaction# DACA>.

<sup>32</sup> See DHS Press Release, *Remarks by Secretary of Homeland Security Jeh Johnson: "Border Security in the 21<sup>st</sup> Century"* – As Delivered (Oct. 9, 2014), available at <http://www.dhs.gov/news/2014/10/09/remarks-secretary-homeland-security-jeh-johnson-border-security-21st-century>; DHS Presentation, *Border Security in the 21<sup>st</sup> Century*, available at [http://www.dhs.gov/sites/default/files/publications/secretary/14\\_1009\\_s1\\_border\\_slide\\_508.pdf#page=1](http://www.dhs.gov/sites/default/files/publications/secretary/14_1009_s1_border_slide_508.pdf#page=1).

<sup>33</sup> See DHS Press Release, *Departments of State, Homeland Security Launch Executive Action on Immigration: Know the Facts Awareness Campaign* (Jan. 5, 2015), available at <http://www.dhs.gov/news/2015/01/05/departments-state-homeland-security-launch-executive-action-immigration-know-facts>.

<sup>34</sup> See Declaration of Michael Hoefler, *Texas v. United States*, Case No. 1-14-CV-00254 (S.D. Tex. Jan. 30, 2015) at ¶¶ 27-31.

<sup>35</sup> Before 2002, more than 75 percent of unaccompanied minor children came from Mexico; by 2014 that number had dropped to just 25 percent. See Muzaffar Chishti and Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple*

those countries are at a crisis point, and many of the children arriving at our border had already experienced violence or threats.<sup>36</sup> The data suggests that those external factors, rather than mistaken beliefs about potential legal benefits in the United States, drove the increases that we saw.<sup>37</sup> If it were otherwise, one would have expected a far steeper rise in the number of unaccompanied minors from Mexico and from Central American countries other than those with the greatest current levels of social unrest.

Another strong factor suggesting that DACA has not increased illegal immigration is the fact that the number of unauthorized immigrants in the United States has been roughly unchanged since 2009.<sup>38</sup> Even accounting for the recent increase in the number of unaccompanied minors, unauthorized migration is at its lowest point in the past 40 years. Over the past fifteen years and across the Clinton, Bush, and Obama administrations, the number of border patrol agents and technology dedicated to our southern border has reached unprecedented levels.<sup>39</sup> If anything, I believe that the DACA and DAPA programs strengthen our border security by allowing DHS to focus more of its resources on the border rather than on apprehending non-criminal individuals whose extended U.S. residence has tied them already into the fabric of our communities.

## **VI. DACA and DAPA are a net fiscal benefit for our country.**

While my background is in immigration law rather than in the law of public benefits, certain top-line facts about the tax and benefits issues surrounding these immigration programs appear to

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*Solutions*, Migration Policy Institute (June 13, 2014), *available at* <http://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions>.

<sup>36</sup> *See id.* (“[M]urder, poverty, and youth unemployment rates paint a bleak picture of conditions that children may face in Honduras, Guatemala, and El Salvador in particular. Rising gang violence in some of these countries has become an undeniable factor in many children’s decision to migrate. A recent UN High Commissioner for Refugees (UNHCR) study based on interviews with more than 400 unaccompanied minors found that 48 percent had experienced violence or threats by organized-crime groups, including gangs, or drug cartels, or by state actors in their home countries, and 22 percent reported experiencing abuse at home and violence at the hands of their caretakers.”).

<sup>37</sup> For instance, Honduras has the highest murder rate in the world. CNN, *Which countries have the world’s highest murder rates? Honduras tops the list* (Apr. 11, 2014), *available at* <http://www.cnn.com/2014/04/10/world/un-world-murder-rates/>.

<sup>38</sup> Jeffrey S. Passel, D’Vera Cohn, Jens Manuel Krogstad, and Ana Gonzalez-Barrera, *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled*, Pew Research Center (Sept. 3, 2014).

<sup>39</sup> *See* DHS Press Release, *Remarks by Secretary of Homeland Security Jeh Johnson: “Border Security in the 21<sup>st</sup> Century” – As Delivered* (Oct. 9, 2014), *available at* <http://www.dhs.gov/news/2014/10/09/remarks-secretary-homeland-security-jeh-johnson-border-security-21st-century>; DHS Presentation, *Border Security in the 21<sup>st</sup> Century*, *available at* [http://www.dhs.gov/sites/default/files/publications/secretary/14\\_1009\\_s1\\_border\\_slide\\_508.pdf#page=1](http://www.dhs.gov/sites/default/files/publications/secretary/14_1009_s1_border_slide_508.pdf#page=1).

allay the most commonly-expressed concerns regarding public assistance to DACA and DAPA recipients. According to the Council of Economic Advisors estimates, the growth in GDP fueled by the DACA and DAPA recipients will reduce the federal deficit by \$25 to \$60 billion over the next ten years.<sup>40</sup> CEA also estimates that wages of American workers will increase by 0.3%. This is because allowing undocumented immigrants to apply for temporary work permits will shrink the underground economy and help ensure that employers are paying all of their workers a fair wage. Unauthorized aliens and some Americans compete today for the same work. If most of these labor market participants are work authorized, there should be upward pressure on the wages paid in these occupations, and this will benefit U.S. workers pursuing those job opportunities.

Even before DACA, roughly 3.1 million undocumented immigrants were paying into the Social Security fund, contributing approximately \$100 billion into the fund in the past decade.<sup>41</sup> Illegal immigrants also contributed \$13 billion in payroll taxes to Social Security in 2010 with only \$1 billion in benefit payments.<sup>42</sup> One would expect these contribution numbers to rise substantially with the increase in the newly-legal workforce under DACA and DAPA, which would in turn increase the stability of the Social Security fund.<sup>43</sup>

While the Congressional Budget Office found that individuals with DAPA and DACA will be able to collect their earned wages under the Social Security system, it is important to note that Social Security and Medicare are earned benefits funded through workers' payroll taxes, with

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<sup>40</sup> White House Council of Economic Advisers, *The Economic Effects of Administrative Action on Immigration*, Nov. 2014, available at [http://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf).

<sup>41</sup> Roy Germano, *Unauthorized Immigrants Paid \$100 Billion Into Social Security Over Last Decade*, Vice News (Aug. 4, 2014), available at <https://news.vice.com/article/unauthorized-immigrants-paid-100-billion-into-social-security-over-last-decade>. See also Marshall Fitz, Philip E. Wolgin, and Patrick Oakford, *Immigrants Are Makers, Not Takers*, Center for American Progress (Jan. 28, 2013), available at <https://www.americanprogress.org/issues/immigration/news/2013/02/08/52377/immigrants-are-makers-not-takers/>.

<sup>42</sup> Stephen Goss, Alice Wade, J. Patrick Skirvin, Michael Morris, K. Mark Bye, and Danielle Huston, Social Security Administration Actuarial Note, *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, [http://www.ssa.gov/oact/NOTES/pdf\\_notes/note151.pdf](http://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf).

<sup>43</sup> See, e.g., The White House Blog, *CBO Report: Immigration Reform Will Shrink the Deficit and Grow the Economy* (June 18, 2013), available at <http://www.whitehouse.gov/blog/2013/06/18/cbo-report-immigration-reform-will-shrink-deficit-and-grow-economy>.

eligibility based on work history and taxes paid. DACA and DAPA recipients will receive those benefits only after they have worked and paid taxes for 10 years.<sup>44</sup>

Unlike American citizens or legal permanent residents, however, DACA and DAPA recipients will not be eligible to receive most public benefits such as CHIP, SNAP, TANF or health care through the state and federal exchanges.<sup>45</sup> Most importantly, the CBO found that the DAPA and DACA programs result in far greater revenues than spending, and eliminating those programs (as the House DHS spending bill requires) would result in an increase in the deficit of \$7.5 billion.<sup>46</sup>

There are strong reasons to believe that DACA and DAPA will only increase participation in the American tax system, by causing undocumented immigrants (many of whom are already working illegally in the United States) and their employers to pay payroll and income taxes.

## **VII. Conclusion**

In conclusion, I believe that the DHS directives rest on sound legal footing and constitute good policy for our nation, its citizens, and the undocumented immigrants whose lives it will improve. The DACA and DAPA programs will make our country safer, will improve our nation's finances, and will further help us to secure our borders. I thank the Committee for the opportunity to introduce testimony on these issues, and I look forward to answering the Committee's questions.

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<sup>44</sup> National Immigration Law Center, *DACA and DAPA Access to Federal Health and Economic Support Programs* (Dec. 2014), available at <http://allianceforcitizenship.org/wp-content/uploads/2014/12/DAPA-DACA-and-fed-health-economic-supports.pdf>.

<sup>45</sup> National Immigration Law Center, *DACA and DAPA Access to Federal Health and Economic Support Programs* (Dec. 2014), available at <http://allianceforcitizenship.org/wp-content/uploads/2014/12/DAPA-DACA-and-fed-health-economic-supports.pdf>.

<sup>46</sup> Congressional Budget Office, Letter Re: Budgetary Effects of Immigration-Related Provisions of the House-Passed Version of H.R. 240, An Act Making Appropriations for the Department of Homeland Security (Jan. 29, 2015), available at <https://www.cbo.gov/sites/default/files/cbofiles/attachments/hr240.pdf>.