

**Statement of
Kris W. Kobach**

**Regarding H.B. 2139
February 24, 2015**

Mr. Chairman and Members of the Committee, I come before you on this matter principally in my private capacity as an attorney who has litigated the legal issues surrounding this bill in multiple states, so that I might provide legal background regarding H.B. 2139, the federal statutes that bear on this matter, and the laws governing an illegal alien who is a student at a public postsecondary institution in Kansas. During 2001-2003, I served as Counsel to U.S. Attorney General John Ashcroft at the U.S. Department of Justice. In that position, I was the Attorney General's chief advisor on immigration law matters. From 2004 to the present, I have been involved in litigation in various states on this issue.

Kansas Stands in Violation of 8 U.S.C. § 1623

For eleven years, Kansas has been violating federal law by offering in-state tuition to illegal aliens. H.B. 2139 would repeal K.S.A. 76-731a, which was enacted by the Kansas Legislature and signed by Governor Sebelius in 2004. K.S.A. 76-731a clearly violates the provision of federal law found at 8 U.S.C. § 1623. In 1996, Congress passed a federal statute specifically prohibiting state governments from giving in-state tuition to illegal aliens. That provision was part of the larger Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Congress declared that no state may give in-state tuition benefits to illegal aliens unless the state extends the same tuition benefits to out-of-state U.S. citizens. The specific text of 8 U.S.C. § 1623 is as follows:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

The intent of Congress in passing 8 U.S.C. § 1623 was unmistakable and unequivocal. The House Conference Report accompanying the bill explained Congress's intent clearly: "This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." Conference Report 104-828, H.R. 2202 (Sept. 24, 1996)(emphasis added). Senator Alan Simpson, sponsor of the Senate version of the bill, summarized the provision simply: "Illegal aliens will no longer be eligible for reduced in-State college tuition." 142 Cong. Rec. S11713 (1996). K.S.A. 76-731a stands in violation of this federal statute.

It is important to understand that 8 U.S.C. § 1623 requires that all U.S. citizens—not just some U.S. citizens who have graduated from Kansas high schools, but all U.S. citizens, no matter how much time they have spent in Kansas—be given access to in-state tuition by any state that provides this benefit to illegal aliens. Some defenders of K.S.A. 76-731a have incorrectly claimed that it might pass muster under federal law if a few U.S. citizens were allowed to qualify for in-state tuition by meeting its criteria. Congress wrote the federal law the way it did for a reason: giving in-state tuition to illegal aliens was to be a choice that no state would want to make, sacrificing the ability to charge out-of-state tuition to any U.S. citizen.

Kansas Law Conflicts with Two Other Federal Laws

In addition to the obvious violation of 8 U.S.C. § 1623, K.S.A. 76-731a also conflicts with two other federal laws. First, K.S.A. 76-731a conflicts with the intent of Congress expressed in 8 U.S.C. § 1601(6): “It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.” Eligibility for in-state tuition rates is a valuable public benefit, as that term is used in federal immigration law. By providing this benefit to aliens unlawfully present in the United States, K.S.A. 76-731a conflicts with the objectives of Congress. Second, K.S.A. 76-731a stands as an obstacle to the enforcement of the Immigration and Nationality Act, generally, because an illegal alien is not eligible to receive this benefit unless he remains in the state of Kansas unlawfully and attends a public institution of higher education. If an alien leaves the United States, as required by federal law, or if he obtains a student visa to attend college legally, he loses eligibility for the benefit provided by K.S.A. 76-731a. Thus, he is rewarded by the state only if he continues to remain unlawfully present in the United States. This stands in direct conflict with federal immigration law, inducing illegal aliens to continue breaking federal law. The U.S. Supreme Court has made clear that it is impermissible for any state to pass a statute that stands in conflict with federal objectives, as K.S.A. 76-731a plainly does.

Rewarding Illegal Aliens, Punishing Legal Aliens

One aspect of K.S.A. 76-731a is particularly offensive—it discriminates against lawfully-admitted aliens. K.S.A. 76-731a excludes from the benefit of in-state tuition eligibility any alien who has “a valid student visa.” In other words, under the terms of K.S.A. 76-731a, if you are an alien in the state of Kansas, you are only eligible for in-state tuition if you are here *illegally*. If you go to the trouble of following the law, obtaining a visa, and entering the country legally, you must pay out-of-state tuition. That is a perverse incentive that rewards law breaking and penalizes those who follow the law.

Subsidizing a Workforce that Cannot Legally Work in Kansas

Proponents of K.S.A. 76-731a when it was before the Kansas legislature evidently believed in 2004 that it would help educate future members of the Kansas workforce. What those proponents failed to realize is that the illegal aliens students cannot legally work in Kansas after they graduate. Indeed, they cannot legally work anywhere in the United States. 8 U.S.C. 1324(a)(3) makes it a crime for any employer to hire them. Moreover, the companies that look for college-educated employees are much more careful about observing federal immigration laws than are employers who rely on unskilled illegal alien labor.

Harming the Illegal Aliens Themselves

In addition, it is important to understand that the K.S.A. 76-731a actually harms its intended beneficiaries more than it helps them. Indeed K.S.A. 76-731a makes it unlikely that these aliens will *ever* become U.S. citizens and realize the American dream. Essentially, the state of Kansas is luring these young adults to stay in Kansas with the promise of taxpayer-subsidized tuition. However, this is a primrose path. What the aliens are not told is that they end up committing a serious and continuing violation of federal immigration law. Under federal law, aliens who accrue one year of unlawful presence in the United States are barred from obtaining a visa for ten years. And the presence of this immigration violation on their records makes it virtually impossible for them to obtain a visa even after the ten years has elapsed. K.S.A. 76-731a is leading these aliens down a dead-end road. They would be much better off returning to their country of origin when they reach the age of eighteen, staying with family members there, and applying for student visas to attend college in the United States legally. Thereafter, a lawfully-admitted alien can seek to adjust his status, become a permanent resident, and eventually seek citizenship.

Litigation

In July 2004, a group of out-of-state U.S. citizens students brought a federal lawsuit challenging K.S.A. 76-731a. I was the lead attorney representing those students. The Kansas Attorney General, agreeing that the Kansas law was in probable violation of federal law, declined to defend the Kansas law. The Kansas Board of Regents was instead represented by private counsel. In 2007, the Tenth Circuit ruled that the U.S. citizen students lacked standing to bring the suit, because they would have to pay out of state tuition even if the offending Kansas law were struck down by the Court. The Court never reached the question of whether or not the Kansas law violates federal law.

President Obama's Executive Amnesties Do Not Bring Kansas into Compliance with Federal Law

In June of 2012, President Obama's Secretary of Homeland Security issued a Directive that attempts to grant "deferred action" to certain illegal aliens who entered the United States before the age of 16 and are currently age 30 or younger. In November of 2014, the President expanded that Directive to include another 4 million illegal aliens who are parents of green card holders or U.S. citizens. Those executive actions are in direct violation of 8 U.S.C. § 1225. They have been challenged successfully in two lawsuits. In the first, I represented ten ICE agents in the case of *Crane v. Napolitano*. The U.S. District Court for the Northern District of Texas held that the Directive is contrary to federal law, which requires ICE agents to remove illegal aliens, not allow them to stay: "Congress's use of the word 'shall' in Section 1225(b)(2)(A) imposes a mandatory obligation on immigration officers to initiate removal proceedings against aliens they encounter who are not 'clearly and beyond a doubt entitled to be admitted.'" *Crane v. Napolitano*, No. 3:12-cv-03247-O, slip op. at 15 (N.D. Tex. April 23, 2013). More recently the U.S. District Court for the Southern District of Texas issued a preliminary injunction against the 2014 Directive, holding that "'The DHS Secretary is not just rewriting the laws, he is creating them from scratch.'" *Texas v. United States*, No. 1:14-cv-00254, slip op. at 99 (S.D. Tex. Feb. 16, 2015).

However, even if the Obama amnesties were to be sustained in the courts, by the Obama Administration's own admission, these "deferred action" amnesties do not grant lawful immigration status to the relevant aliens. Consequently, K.S.A. 76-731a remains a violation of federal law, regardless of whether or not the executive amnesties survive, because the Kansas statute offers in-state tuition to "an alien who is not lawfully present in the United States."

Conclusion

For the past eleven years, K.S.A. 76-731a has been in effect, resulting in a continuing violation of federal law. This has cost Kansas taxpayers more than \$12 million over that time period; as they have subsidized the tuition of a workforce that has no legal right to work in the United States. It has also been grossly unfair to the United States citizens and *legal* aliens who are charged three times as much in tuition as the illegal aliens. I urge you to bring the state of Kansas back into compliance with federal law, and to remove this incentive for illegal aliens to remain in the state of Kansas.