

Background

No. 1960
August 14, 2006



Published by The Heritage Foundation

The Senate Immigration Bill Rewards Lawbreaking: Why the DREAM Act Is a Nightmare

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It is no secret that the Comprehensive Immigration Reform Act of 2006 (S. 2611), passed by the U.S. Senate on May 25, 2006, contains numerous provisions that reward illegal aliens for violating federal immigration law. What is less well known is that the Senate bill also condones the violation of federal law by 10 U.S. states. Indeed, S. 2611 expressly shields these states from liability for their past violations of federal law.

These absurdities are found in the Development, Relief, and Education for Alien Minors (DREAM) Act provisions of S. 2611.¹ Just before the Senate Judiciary Committee approved the first version of the bill in the evening of March 27, 2006, Senator Richard Durbin (D-IL) offered the DREAM Act as an amendment. It passed on a voice vote and was in the compromise version of the bill that the Senate passed in May.

The DREAM Act is a nightmare. It repeals a 1996 federal law that prohibits any state from offering in-state tuition rates to illegal aliens unless the state also offers in-state tuition rates to all U.S. citizens. On top of that, the DREAM Act offers a separate amnesty to illegal-alien students.

The DREAM Act

On its own, the DREAM Act never stood a chance of passing. For years, polls have shown consistently that overwhelming majorities of voters oppose giving in-state tuition benefits to illegal aliens. Not surprisingly, the DREAM Act languished in committee for four years until the opportunity arose to hitch it to the Senate's immigration bill.

Talking Points

- The Senate immigration reform bill's DREAM Act provisions repeal a 1996 federal law that prohibits any state from offering in-state tuition rates to illegal aliens unless the state also offers in-state tuition rates to all U.S. citizens.
- Ten states have enacted laws in violation of that policy. The DREAM Act provisions would retroactively change federal law, pardoning the states for violating federal law.
- Allowing in-state tuition for illegal aliens encourages the violation of federal immigration law and is unfair to legal aliens and out-of-state U.S. citizens.
- The DREAM Act provisions would also create another type of amnesty by opening a wide path to citizenship for any illegal alien who entered the country before the age of 16, has been in the country for at least five years, and has earned a high school diploma or a GED in the United States.

This paper, in its entirety, can be found at:
www.heritage.org/research/immigration/bg1960.qfm

Produced by the B. Kenneth Simon
Center for American Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
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Events of the past 10 years illustrate how the DREAM Act would undermine the rule of law. In September 1996, Congress passed the landmark Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Led by Lamar Smith (R–TX) in the House of Representatives and Alan Simpson (R–WY) in the Senate, Congress significantly toughened the nation’s immigration laws. To his credit, President Bill Clinton signed the bill into law.

Open-borders advocates in some states—most notably California—had already raised the possibility of offering in-state tuition rates to illegal aliens who attend public universities. To prevent such a development, the IIRIRA’s sponsors inserted a clearly worded provision that prohibited any state from doing so unless it provided the same discounted tuition to all U.S. citizens:

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.²

Members of Congress reasoned that no state would be interested in giving up the extra revenue from out-of-state students, so this provision would ensure that illegal aliens would not be rewarded with a taxpayer-subsidized college education. The IIRIRA’s proponents never imagined that some states might simply disobey federal law.

States Subsidizing the College Education of Illegal Aliens

However, that is precisely what happened. In 1999, radical liberals in the California legislature pushed ahead with their plan to have taxpayers subsidize the college education of illegal aliens.

Assemblyman Marco Firebaugh (D) sponsored a bill that would have made illegal aliens who had resided in California for three years during high school eligible for in-state tuition at California community colleges and universities.

Democrat Governor Gray Davis vetoed the bill in January 2000, stating clearly in his veto message that it would violate federal law:

[U]ndocumented aliens are ineligible to receive postsecondary education benefits based on state residence.... IIRIRA would require that all out-of-state legal residents be eligible for this same benefit. Based on Fall 1998 enrollment figures...this legislation could result in a revenue loss of over \$63.7 million to the state.³

Undeterred, Firebaugh introduced his bill again, and the California legislature passed it again. In 2002, facing flagging poll numbers and desperate to rally Hispanic voters to his cause, Governor Davis signed the bill.

Meanwhile, similar interests in Texas succeeded in enacting their own version of the bill. Over the next four years, interest groups lobbying for illegal aliens introduced similar legislation in most of the other states.

The majority of state legislatures had the good sense to reject the idea, but eight states followed the examples of California and Texas, including some states in the heart of “red” America. Today, the 10 states that offer in-state tuition to illegal aliens are California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington.

In most of these states, the law was passed under cover of darkness because public opinion was strongly against subsidizing the college education of illegal aliens at taxpayer expense. The governors even declined to hold press conferences or signing ceremonies heralding the new laws.

1. S. 2611, § 621–632.

2. 8 U.S. Code, § 1623.

3. Gray Davis, veto message to California Assembly on AB 1197, September 29, 2000, at info.sen.ca.gov/pub/99-00/bill/asm/ab_1151-1200/ab_1197_vt_20000929.html (August 10, 2006).

However, in Nebraska, the last of the 10 states to pass the law, something unusual happened. During the 2006 session, Nebraska's unicameral legislature passed an in-state tuition bill for illegal aliens. Governor Dave Heineman vetoed the bill because it violated federal law and was bad policy. In mid-April, the legislature, which included 20 lame-duck Senators, overrode his veto by a vote of 30 to 19.

The veto would become an issue in the 2006 Republican gubernatorial primary. Heineman's opponent was the legendary University of Nebraska football coach and sitting U.S. Representative Tom Osborne, a political demigod in the Cornhusker State. Osborne had never received less than 82 percent of the vote in any election. Heineman, on the other hand, had not yet won a gubernatorial election. He became governor in 2005 when Governor Mike Johanns resigned to become U.S. Secretary of Agriculture.

Few believed that Heineman had a chance of winning the primary, but Coach Osborne fumbled. He criticized Heineman for vetoing the in-state tuition bill and indicated that he favored the idea of giving subsidized tuition to illegal aliens. The voters reacted negatively, and Heineman surged ahead in the final weeks to beat Osborn by 50 percent to 44 percent in the primary election on May 9, 2006. After the vote, both candidates said the tuition issue had been decisive.

State-Subsidized Lawbreaking

In all 10 states, the in-state tuition laws make for shockingly bad policy.

First, providing in-state tuition rates to illegal aliens amounts to giving them a taxpayer-financed education. In contrast, out-of-state students pay the full cost of their education. This gift to illegal aliens costs taxpayers a great deal of money at a time when tuition rates are rising across the country. The costs of these subsidies are staggering. For example, California taxpayers pay more than \$50 million annually to subsidize the college education of thousands of illegal aliens.

Second, these states are encouraging aliens to violate federal immigration law. Indeed, breaking federal law is a prerequisite for illegal aliens because state laws expressly *deny in-state tuition to legal aliens* who have valid student visas. An alien is eligible for in-state tuition only if he remains in the state in violation of federal law and evades federal law enforcement. Legal aliens must pay out-of-state tuition. The states are directly rewarding this illegal behavior.

This situation is comparable to a state passing a law that rewards residents with state tax credits for cheating on their federal income taxes. These 10 states are providing direct financial subsidies to those who violate federal law.

Third, not only are such laws unfair to aliens who follow the law, but they are slaps in the faces of law-abiding American citizens. For example, a student from Missouri who attends Kansas University and has always played by the rules and obeyed the law is charged three times the tuition charged to an alien whose very presence in the country is a violation of federal criminal law.

Even if a good argument could be made for giving in-state tuition benefits to illegal aliens, the bottom line is that the policy violates federal law. These 10 states have brazenly cast aside the constraints imposed by Congress and the U.S. Constitution.

Pending Lawsuits

In July 2004, a group of U.S. citizen students from out of state filed suit in federal district court in Kansas to enjoin the state from providing in-state tuition rates to illegal aliens.⁴ They pointed out that Kansas is clearly violating federal law and the Equal Protection Clause of the U.S. Constitution by discriminating against them in favor of illegal aliens.

The district judge did not render any decision on the central questions of the case. Instead, he avoided the issues entirely by issuing a particularly weak ruling that the plaintiffs lacked a private right of action to bring their statutory challenge and lacked standing to bring their Equal Protection challenge. The case is currently before the U.S.

4. See *Day v. Sebelius*, 376 F. Supp. 2d 1022 (2005).

Court of Appeals for the Tenth Circuit. Regrettably, the wheels of justice grind slowly, and a decision is unlikely before the spring of 2007.

Meanwhile, in December 2005, another group of U.S. citizen students filed a class-action suit in a California state court.⁵ They too maintain that the state is violating federal law and the U.S. Constitution. Pursuant to a California civil rights statute, they are also seeking damages to compensate them for the extra tuition that they have paid above that charged to illegal aliens. Additional suits will likely be filed by U.S. citizens in the eight other states.

Another Senate Bill Amnesty

Just when it looked as if U.S. citizens might vindicate their rights under federal law and the wayward states would be held accountable, the Senate passed the immigration bill, offering the offending states a pardon.

The DREAM Act provisions, which are buried more than 600 pages into S. 2611, grant an unusual reprieve to the offending states. They retroactively repeal the 1996 federal law that the 10 states violated, making it as though the provisions in the 1996 law never existed.⁶

On top of this insult to the rule of law, the DREAM Act would create a massive independent amnesty in addition to the even larger amnesty that the rest of S. 2611 would confer. This amnesty opens a wide path to citizenship for any alien who entered the country before the age of 16 and has been in the country for at least five years. As with the rest of the Senate bill, the guiding notion seems to be “The longer you have violated federal law, the better.”

Beyond that, all the alien needs is a high school diploma or a GED earned in the United States. Alternatively, he need only persuade an institution of higher education in the United States—any community college, technical school, or college—to admit him.

The DREAM Act abandons any pretense of “temporary status” for the illegal aliens who apply.

Instead, all amnesty recipients are awarded lawful permanent resident (green card) status. The only caveat is that the alien’s status is considered “conditional” for the first six years. To move on to the normal green card, the alien need only obtain a degree from any institution of higher education, complete two years toward a bachelor’s degree, or show that doing so would present a hardship to himself or his family members. Of course, an alien with a normal green card can bring in family members and seek citizenship.

Furthermore, the DREAM Act makes it absurdly easy for just about any illegal alien—even one who does not qualify for the amnesty—to evade the law. According to Section 624(f), once an alien files an application—*any application*, no matter how ridiculous—the federal government is prohibited from deporting him. Moreover, with few exceptions, federal officers are prohibited from either using information from the application to deport the alien or sharing that information with another federal agency, under threat of up to \$10,000 fine.

Thus, an alien’s admission that he has violated federal immigration law cannot be used against him—even if he never had any chance of qualifying for the DREAM Act amnesty in the first place. The DREAM Act also makes illegal aliens eligible for various federal student loans and work-study programs.

Conclusion

In addition to being a dream for those who have broken the law, the DREAM Act raises an even larger issue regarding the relationship between states and the federal government. The 10 states have created a 21st century version of the nullification movement—defying federal law simply because they do not like it. In so doing, they have challenged the basic structure of the republic. The DREAM Act would pardon this offense and, in so doing, encourage states to defy other federal law in the future.

5. See Stuart Silverstein, “Out-of-State Students Sue over Tuition: Plaintiffs Are Challenging California Practices That Require Them to Pay Higher College Costs Than Some Illegal Immigrants,” *Los Angeles Times*, December 15, 2005, p. B3.

6. S. 2611, § 623.

One thing that has been learned in the struggle to enforce federal immigration laws is that states cannot be allowed to undermine the federal efforts to enforce them. Rule of law can be fully restored only if all levels of government are working to uphold it.

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